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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 132.

JOHN FLANNELLY AND MARY ELLEN FLANNELLY, PETITIONERS,

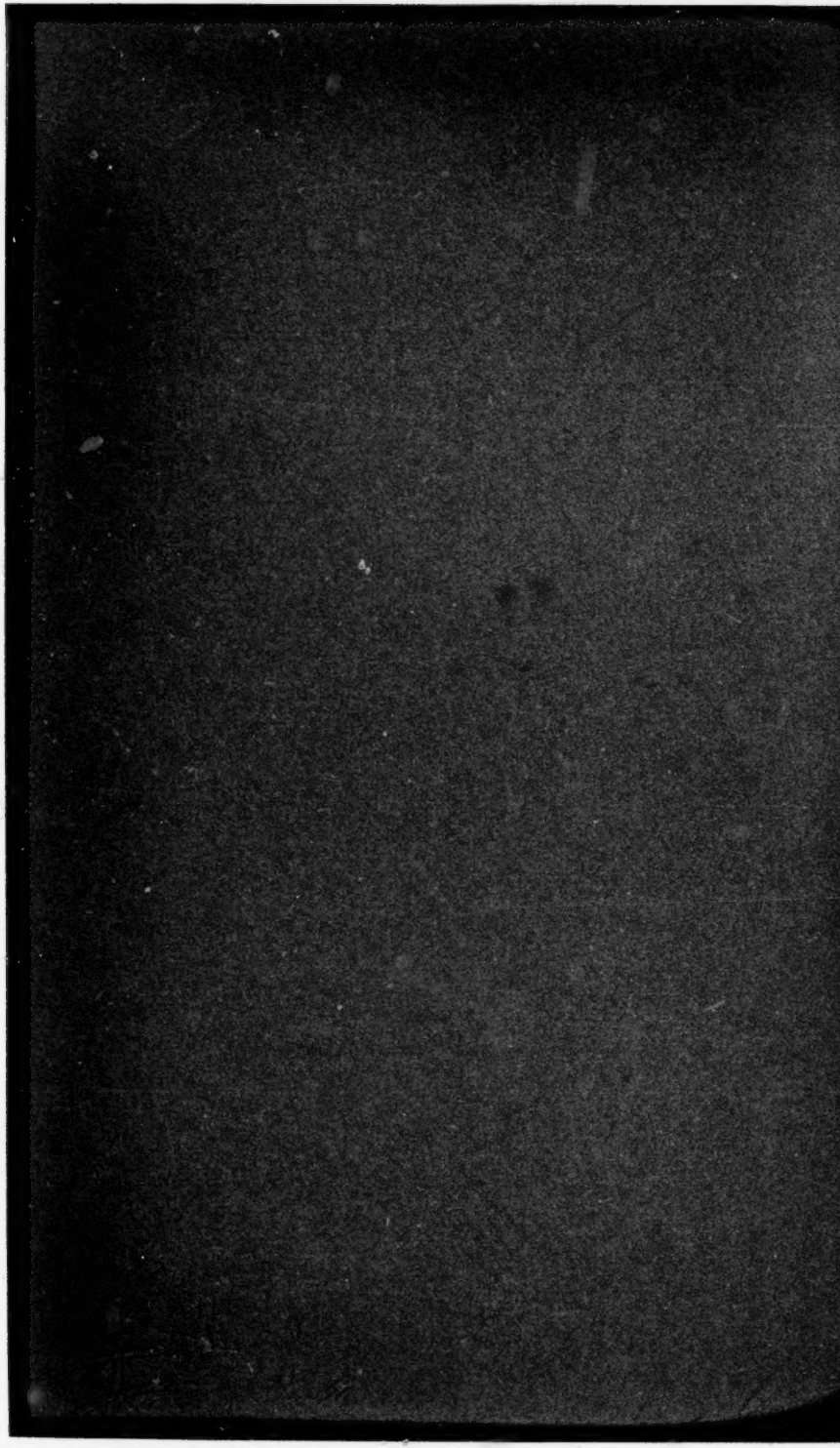
vs.

THE DELAWARE AND HUDSON COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1911.
CERTIORARI AND RETURN FILED NOVEMBER 2, 1911.

(21,831.)



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IN THE

Circuit Court of the United States

FOR THE

Middle District of Pennsylvania.

JOHN FLANNELLY and MARY ELLEN FLANNELLY, both residents and citizens of the State of Pennsylvania, vs. THE DELAWARE AND HUDSON COMPANY, a citizen and corporation of the State of New York.	No. 124 Jan'y Term, 1908.

DOCKET ENTRIES

Dec. 14, 1907,	Praecipe for summons in trespass and statement.
Dec. 14, 1907,	Summons in trespass issued returnable first Monday inJanuary next.
Dec. 18, 1907,	Summons returned served.
Jan. 2, 1908,	Amendments to plaintiffs' statement allowed.
Jan. 6, 1908,	Praecipe for appearance of Welles & Torrey, Esqs. for defendant.
Jan. 7, 1908,	Praecipe for rule to plead.
Jan. 7, 1908,	Rule to plead issued ret. in fifteen days.
Jan. 23, 1908,	Plea: Not Guilty.

Mar. 23, 1908, Jury called and sworn (see minutes).

Mar. 26, 1908, Court directs and attachment to issue for Jos. Gan a witness.

Mar. 26, 1908, Attachment issued to Marshal.

Mar. 26, 1908, Court directs a bench warrant to issue for Edward Weiss.

Mar. 26, 1908, Bench warrant issued to Marshal

Mar. 26, 1908, Verdict:—"The jury do find in the above case in favor of the plaintiff, Mary Flannelly, in the sum of $2,000, and in favor of John Flannelly in the sum of $500.00. Defendant Company was negligent in failing to sound the blast of a whistle at the proper place and at the proper time at the crossing of the Deft. where the plaintiff, Mary Flannelly, received her injuries. Wm. J. Heavy, Forman.

Mar. 27, 1908, Attachment returned served.

Mar. 27, 1908, Bench warrant returned served.

Mar. 27, 1908, Edward Weiss sentenced to pay costs.

Mar. 27, 1908, Rule for judgment non obstante veredicto.

June 15, 1908, Charge of Court.

June 15, 1908, Transcript of stenographer's notes of testimony and proceedings.

Sept. 14, 1908, Affidavit of Mary Davis, et. al. and Order of Court thereon directing that a rule be entered on the Plaintiff to show cause why a new trial should not be granted returnable Sept. 28 inst. at 2 p. m.

Sept. 30, 1908,	Opinion sur rule for judgment for defendant non obstante veredicto discharging rule.
Nov. 28, 1908,	Opinion discharging rule for new trial.
Nov. 28, 1908,	Depositions on part of defendant in Rule for new trial on ground of after discovered evidence.
Nov. 28, 1908,	Testimony in support of the rule (Deft's copy).
Dec. 8, 1908,	Plaintiff's Bill of Costs.
Jan. 4, 1908,	Petition for writ of error.
Jan. 4, 1908,	Allowance of writ of error.
Jan. 4, 1908,	Bond in the sum of $5,000.00.
Jan. 4, 1908,	Citation returnable Feb. 3, 1909.
Jan. 4, 1908,	Writ of error.
Jan. 4, 1908,	Order eliminate certain parts of record.

IN THE
CIRCUIT COURT OF THE UNITED STATES,
Middle District of Pennsylvania.

JOHN FLANNELLY and MARY ELLEN FLANNELLY, both residents and citizens of the State of Pennsylvania,	No. 124 Jan'y Term,
vs.	
THE DELAWARE AND HUDSON COMPANY, a citizen and corporation of the State of New York.	1908.

To E. R. W. Searle,
Clerk of Said Court,

Sir:

Issue Summons in above stated case in an action of trespass, Returnable Sec. Leg.

PAUL J. SHERWOOD,
Attorney for Plaintiff.
Dec. 14, 1907.

IN THE
CIRCUIT COURT OF THE UNITED STATES
Middle District of Pennsylvania.

JOHN FLANNELLY and MARY ELLEN FLANNELLY, both residents and citizens of the State of Pennsylvania, vs. THE DELAWARE AND HUDSON COMPANY, a citizen and corporation of the State of New York.	No. 124 Jan'y Term, 1908.

PLAINTIFF'S STATEMENT

Plaintiffs, John Flannelly and Mary Ellen Flannelly, by their attorney, Paul J. Sherwood, complain of the defendant, the Delaware and Hudson Company, and set forth their cause of action in trespass as follows:

Said plaintiffs are respectively husband and wife, and are both resident citizens of the Township of Pittston, Luzerne County, Pennsylvania, and were at the time of the grievance hereinafter set forth, and are both resident citizens within the jurisdiction of the said Court.

Said defendant is a corporation duly incorporated in and under the laws of the State of New York, and is a citizen of said State of New York, and was at the time of the grievance hereinafter set forth.

The sum involved in this action exceeds the sum of $2500, and the claim arises out of circumstances the salient features of which are as follows:

Said Mary Ellen Flannelly, on the 30th day of July 1907, was about 11 a. m. a traveler lawfully

driving a horse hitched to a carryall wagon enroute, by way of a main public highway leading from the City of Scranton, Pa., to the City of Pittston, Pa., from the village of Dupont in said Luzerne County, Pennsylvania, to the City of Pittston, said County.

Within said village of Dupont the said public highway is crossed on a somewhat diagonal line by four parallel tracks,—the railroad of said defendant, which tracks are of varying distance apart. Although said railroad and said public highway are in almost constant use day and night, the crossing was negligently permitted by said defendant to remain unguarded and unattended by watchman, and without safety appliances, or devices whereby the traveling public might be warned or guarded from danger of approaching trains.

The first track of said railroad as plaintiff approached said crossing, was a side freight line; the second and third tracks were the main lines, and the fourth a track for conveying coal from the mines.

Said tracks on said date were in the ownership, control and operation of said defendant, who, through its agents and employees was operating upon said tracks freight and passenger trains and carrying on the general line of work usually incident to such corporations.

It then and there became and was the duty of said defendant to use due and reasonable care to so guard its said tracks and to so operate its said traffic and run its trains upon and over said highway crossing as to make it reasonably safe for any one lawfully attempting to cross its said tracks at said crossing.

Said plaintiff avers that said defendant, well knowing its duty in said premises, did wholly disregard and neglect the same and that consequently, on

said date, while said plaintiff was with due care attempting to drive across said crossing at said point on said highway, said defendant so negligently operated its freight trains upon said tracks as to destroy the usual opportunity at said crossing, to see or hear approaching trains and then did negligently and unlawfully run her down by a rapidly propelled passenger train, commonly called the "Flyer," which train was behind time and was being run at said time at great and unreasonable speed, and negligently approached said crossing without due and timely warning of its approach.

Said wagon in which said plaintiff was riding was struck and demolished by said defendant's said passenger train, the horse and harness injured and damaged and said plaintiff hurled with great force to the ground and terribly bruised, lacerated and wounded, whereby she has been rendered a permanent sufferer and cripple.

Said plaintiffs therefore claim damages, the said John Flannelly for the value of said wagon, damages to said harness and horse, medical and other expenses incurred and to be incurred and to be incurred for his wife, and the loss of her services, in the sum of $10,000, and the said Mary Ellen Flannelly in her own behalf for pain and suffering, physical and mental, and inconvenience, and embarassment endured and likely to endure, in the sum of $25,000, and they therefore bring this action to recover therefor.

PAUL J. SHERWOOD,
Attorney for Plaintiffs.
Dec. 14, 1907.

The foregoing paper contains the following endorsement:

No. 124 J. Term, 1908.

John Flannelly and Mary Ellen Flannelly, both residents and citizens of the State of Pennsylvania.

vs.

The Delaware and Hudson Company, a citizen and corporation of the State of New York.

Plaintiffs Praecipe and Statement.

Filed Dec 14, 1907
E. R. W. SEARLE,
Clerk.

PAUL J SHERWOOD,
Wilkes-Barre, Pa.,
Attorney for Plaintiffs.

UNITED STATES,
MIDDLE DISTRICT OF PENNSYLVANIA, } Set.

THE PRESIDENT OF THE UNITED STATES,

TO THE MARSHAL OF THE MIDDLE DISTRICT OF PENNSYLVANIA, GREETING:

WE COMMAND YOU, That you summon The Delaware & Hudson Company, a citizen and corporation of the State of New York, late of your District, if it be found therein, so that it be and appear before the Judges of the Circuit Court of the United States, in and for the Middle District of Pennsylvania, of the Third Circuit, at a session of the same Court to

be holden at Scranton on the first Monday of January next, to answer John Flannelly and Mary Ellen Flannelly, both residents and citizens of the State of Pennsylvania, in a plea in trespass.

And have you then and there this writ.

WITNESS, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Scranton, this 14th day of Dec. A. D. 1907, and in the 132nd year of the Independence of the United States.

(Seal)

E. R. W. SEARLE,
Clerk of the Circuit Court,
per G. C. Scheuer,
Dep. Clerk.

The foregoing paper is endorsed as follows:—

Served the within writ of summons upon the Delaware and Hudson Company, by producing the within writ to W. J. Torrey, a member of the firm of Welles and Torrey at the office of James H. Torrey, attorney designated upon whom service can be made on said Company, also by handing to and leaving with the said W. J. Torrey, a true and attested copy of the within writ, service of the within writ was made on the 16th day of December 1907, at Scranton, Pa., Connell Bldg., and in the Middle District of Penn.

So answers

CHARLES B. WITMER,
U. S. Marshal.

By J. W. SNYDER,
Dep.
No. 124.

Circuit Court, Jan. Session, 1908,

John Flannelly, et. al.

vs.

The D. & H.

SUMMONS.

Returnable on the first Monday of January 1908.

PAUL J. SHERWOOD,

Wilkes-Barre, Pa.

Attorney for Plaintiff.

Dec. 14, 1907.

Came to hand 11 o'clock a. m. Marshal's Docket, No. 544.

C. B. WITMER,

U. S. Marshal.

Filed Dec. 18, 1907,

E. R. W. SEARLE,

Clerk.

IN THE
CIRCUIT COURT OF THE UNITED STATES,
Middle District of Pennsylvania.

JOHN FLANNELLY and MARY ELLEN FLANNELLY, both residents and citizens of the State of Pennsylvania, vs. THE DELAWARE AND HUDSON COMPANY, a citizen and corporation of the State of New York.	No. 124 Jan'y Term, 1908.

AMENDMENTS TO PLAINTIFFS' STATEMENT.

NOW, January 2, 1908, plaintiffs by their attorney, beg leave to amend plaintiffs' statement as filed in the above stated case by striking out the entire 4th clause of said statement which reads as follows:

"The Sum involved in this action exceeds the sum of $2500, and the claim arises out of circumstances the salient features of which are as follows: "and inserting the following clause:

Said plaintiffs aver that the matter in dispute in this action, exclusive of interest and costs, exceeds the sum and value of $2000, and the claim arises out of the circumstances as follows:

Respectfully submitted,
PAUL J. SHERWOOD,
Att'y. for Plaintiffs.
Jan. 2, 1908.

STATE OF PENNSYLVANIA, }
COUNTY OF LACKAWANNA, } ss.

Personally before me appeared Paul J. Sherwood, who being duly sworn according to law deposes and says:

That the omissions and error contained in said Original Statement was a clerical error and an informality which may effect the merits of the case and further saith not.

PAUL J. SHERWOOD.

Sworn and subscribed to before me
this 2nd day of January, 1908.

. . . . . .

The foregoing paper is endorsed as follows:—

No. 124, January Term, 1908.

John Flannelly and Mary Ellen Flannelly, both residents and citizens of the State of Pennsylvania,

vs.

The Delaware and Hudson Co., a citizen and corporation of the State of New York.

AMENDMENTS TO PLAINTIFFS' STATEMENT.

NOW, January 2, 1908, on motion of counsel in open court and presentation of within affidavit amendment is granted as prayed for.

R. W. ARCHBALD,
Dist. Judge.

Filed Jan. 2, 1908.
E. R. W. SEARLE,
Clerk.

SHERWOOD & HESS,
Attorneys at Law,
Bennett Building,
Wilkes-Barre, Pa.

IN THE
CIRCUIT COURT OF THE UNITED STATES
For the Middle District of Pennsylvania.

JOHN FLANNELLY and MARY ELLEN FLANNELLY vs. THE DELAWARE AND HUDSON COMPANY.	No. 124 Jan'y Term, 1908.

TO THE CLERK OF THE SAID COURT:—

Enter our appearance for the defendant company, January 6, 1908.

WELLES & TORREY,

The foregoing paper is endorsed as follows:—

No. 124 January Term. 1908.

John Flannelly and Mary Ellen Flannelly,
vs.
The Delaware and Hudson Company

APPEARANCE

Filed Jan. 6. 1908.
E. R. W. SEARLE,
Clerk.

WELLES & TORREY,
Attorneys and counselors at Law,
Nos. 320 to 324 Connell Building,
Scranton, Pa.

IN THE
CIRCUIT COURT OF THE UNITED STATES
For the Middle District of Pennsylvania.

JOHN FLANNELLY and MARY ELLEN FLANNELLY vs. THE DELAWARE AND HUDSON CO.	No. 124 Jan'y Term, 1908.

AND NOW, to wit, January 7th, 1908, Rule entered in the above entitled case, upon defendant to plead in fifteen days or judgment sec. reg.

PAUL J. SHERWOOD,
Atty for Plffs.

The foregoing paper is endorsed as follows:—
No. 124 Jan. Term, 1908.
Appearance Docket.
Circuit Court of the United States
Middle District of Pennsylvauia.
John Flannelly
vs.
Delaware & Hudson Company.

RULE TO PLEAD.

Filed Jan. 7, 1908.
E. R. W. SEARLE,
Clerk.

IN THE
CIRCUIT COURT OF THE UNITED STATES
For the Middle District of Pennsylvania.

JOHN FLANNELLY and MARY ELLEN FLANNELLY vs. DELAWARE AND HUDSON COMPANY.	No. 124 January Term, 1908

Enter plea "Not Guilty" on behalf of the defendant in the above entitled case.

WELLES & TORREY,
Attorneys for Defendant.

TO THE CLERK OF THE ABOVE COURT

The foregoing paper is endorsed as follows:—

No. 124 January Term, 1908.

Circuit Court of the U. S. for
The Middle District of Pa.

JOHN FLANNELLY and
MARY ELLEN FLANNELLY
VS.
DELAWARE AND HUDSON
COMPANY.

PLEA

Filed Jan. 23, 1908.
E. R. W. SEARLE,
Clerk,

WELLES & TORREY,
Attorneys and Counselors at Law,
Nos. 320 to 324 Connell Building,
Scranton, Pa.

JOHN FLANNELLY et al
vs.
DELAWARE & HUDSON CO.

No. 124 Jan. Term, 1908.

JURY AND WITNESS LIST.

1. Wm. Heavy.
2. G. A. Walker.
3. G. Fred Lazarus.
4. Henry C. Huff.
5. Frank Brandsley.
6. W. C. Oldt.
7. E W. Bishop.
8. A. Weber.
9. J. M. Welson.
10. Emberdy Givler.
11. Herbert F. Brewster.
12. D. J. Sweet.

PLAINTIFFS' WITNESSES.

Wm. May Flannery.
Chas. Strubeck.
Leon Strubeck.
C. Harry Gilfeather.
Roy Wallace.
Jack Avoskey.
Alice Ahenis.

Wm. Weltz.
John Flannelly.
Wm. Leidy.
Freeman Larned.
Wm. Harlos.
Mrs. Annie Larned.
Mrs. Susan Thomas.
Mrs. Alvin Linn.
Julia Loohill.
Wm. Gannan.
Miss Lizzie Flannelly.
Mrs. Julia Flannelly.
Mrs. Alims.
Mrs. John McAndrews.
Mrs. Humphrey.
Dr. Pier.
Dr. E. J. Butler.
C. H. Mahan.
John Doe.
Henry Doe.

DEFENDANTS' WITNESSES.

W. N. Manchester.
A. F. Dershum.
Dr. Reed Burns.
Dr. Theodore Weisenberg.
Milo Gardner.
G. F. Mason.
Wm. Heisten.
E. A. Wanaka.
Leny Potter.
Martin Crippin.
Flitarer Hisin.
W. S. Crwks.

W. E. Bartholmes.
W. S. Kubs.
M. M. Richards.
John Serfass.
Jos. Becker.
Wesley Saeger.
Edward O'Donnell.
John Kermak.
Frank Carbank.
John McMahon.
John Taylor.
Mrs. Dracus.
Mrs. Andio Yanko.
Mr. Miller Dutpe.
Dr. A. W. Thomas.
Jos. Gan.

The foregoing paper is endorsed as follows:—

No. 124,
Jury List

IN THE

CIRCUIT COURT OF THE UNITED STATES

For the Middle District of Pennsylvania.

JOHN FLANNELLY and MARY ELLEN FLANNELLY
vs.
DELAWARE AND HUDSON COMPANY.

No. 124 January Term, 1908

Charge of the Court, delivered by Hon. R. W. Archbald, (District Judge) at Scranton, Pa., March 26th, 1908.

Gentlemen of the Jury:—

It is a delicate and difficult thing either for judge or jury to decide between man and man, and a judge s position is somewhat easier than a jurors, because if a judge makes a mistake, (having merely to pass on matters of law) there are higher courts to correct him; whereas a juror must decide the case on the merits; has got to go into the facts; reconcile conflicting testimony; decide which witnesses are to be believed, and which are to be rejected, and, applying the common sense judgment of ordinary life, arrive as best they can at justice. Persons who are not telling the truth, may have the appearance of doing so; one who is truthful may not appear that way; may hesitate perhaps in his testimony, in his excess of trying to be careful, and so not convey a good impression; and, taking it altogether, there may be

such conflict—such opposition on one side and the other, as to make it most difficult for a juror to see where he should go.

It seems to me that this case presents, and warrants, much of what I have said. On the one side it is contended here that this company was negligent upon that occasion, causing this accident and injury, and that the plaintiff, Mrs. Flannelly, has been seriously and permanently injured as the outcome. On the other hand, it is contended that the company did all that could have been expected under the circumstances, and that the accident occurred not through fault of theirs, but really through the fault or negligence of Mrs. Flannelly herself, and that if she experienced any injury upon that occasion she only has herself to blame for it; and, further, that such as she did receive is not at all what appears upon the surface, and that her present apparent condition is due to hysteria; is put on, or simulated, and not actual. It is your good sense, gentlemen, that has got to unravel this problem; it is for you to say, applying your best judgment to the facts as I shall endeavor to present them to you, where the truth in this case lies, and what will be justice between these parties. You are to be guided by your judgment, let me warn you, and not carried away by sympathy. You are to render a verdict based on that altogether. You are not entitled to render a verdict, (or to give a verdict as we sometimes say, although that sometimes implies you are making a gift and not deciding it) except as the testimony warrants it, and according to that testimony

As I have said to you, the charge here is that the people who were running that train, representing the defendant company, were negligent upon that

occasion; that is to say, that in some particular they failed of that which was required of them. Unless this is made out by the weight of the evidence, your verdict must be in favor of the defend ant. This point is not to be slurred over or evaded; you must meet it squarely in your own mind, and when you are discussing the case in the jury room, and unless you are satisfied by the weight of the evidence that the company is convicted of negligence, your verdict cannot be in favor of the plaintiff, you must be able, as I may say, to put your finger upon something which you regard as a failure on the part of the company to meet this duty, before you are prepared to render a verdict against them. This is so important that I will ask you, if your verdict should be in the plaintiff's favor, to specify in what particular the defendant company was negligent.

Let us look then at the different matters that are suggested to make out negligence, and, first, with regard to the character of the crossing. It is said that this was a grade crossing, and therefore dangerous, and possibly it has been argued to you that it ought not to be allowed to continue; but there is nothing to show that the defendant company is responsible for that condition. The feeling no doubt is against grade crossings, because of the danger to travelers by reason of them, and the policy of some railroads is to do away with them as much as possible; but streets and highways are not altogether under the control of the officers of the railroads; nor have we anything to show in this instance how it happened with regard to this one, whether the railroad was run over the highway; that is to say, whether the highway was in existence at the time the road was located, or whether it has been laid

across it since and it has not been shown, either, how far a change would be feasible, or that the township or Borough officers, whichever character of municipality this is, would consent to an over-head or an underground crossing; nor can any stress be laid upon the number of tracks that were there;—no doubt they are somewhat numerous; Not only were there the three tracks of the defendant company, but there is what is spoken of as the Lehigh Valley cut-off, and the Lehigh Valley track on the westerly side of the defendant's railroad, all of which, no doubt, assist to complicate the situation; but, at the same time, this company of course has a right to have enough tracks there to accommodate its business, and it is hardly chargeable with negligence because of endeavoring in this way to meet that necessity. More serious is the suggestion that there is nothing in the way of safety gates or an automatic electric alarm signal, nor a flagman, which sometimes are provided to guard such a crossing; but that is expected in settled towns, in places that are built up; in streets of cities and boroughs where there is constant travel, rather than out in the country on a dirt road or sparsely settled community. As some stress has been laid upon this, let me read you what has been said upon the subject by the Supreme Court of the United States, which lays down the law for all of us:—"It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing it must be first shown that such crossing is more than ordinarily hazardous; as for instance, that it is in a thickly populated portion of a town or city, or that

the view of the track is obstructed either by the company itself or by other objects, proper in themselves, or that the crossing is a much traveled one and the noise of the approaching trains is rendered indistinct, and the ordinary signals difficult to be heard by reason of absolute confusion incident to railway or other business, or by reason of some such light cause, and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country." Now, were there any such conditions as are so described here, calling for anything of this character in the way of safety gates or a flagman? The scheduled trains of the two companies making use of these tracks, only, in the daylight hours, make about one train in twenty minutes. There are not, certainly, so very many people passing across that track, according to the count that has been made of them. The people living about there are not, as I understand it, in the immediate vicinity, except this row of red houses where a few families live. The place is, essentially, in the country, and not in the town or city. There are no obstructing buildings about there, if I am right in my knowledge of the place, and these photographs in evidence are to be relied upon; so that it seems to me you have very little, if anything, on which to base the contention that the company were negligent in leaving that crossing without some such protection as that. Now then, if there is nothing in the condition of the crossing requiring anything of this nature, or upon which negligence can be based for the lack of it, the only other thing is as to the running of the trains out of which negligence can arise. It is said that this train was run

ning with undue speed. But people demand that; the people want fast trains, You and I if we get on a passenger train, complain if it is not going at a pretty good speed. We don't want to ride on a slow train; we avoid them; we want to get there; and what the public demand, the railroad companies, as public servants, respond to; their trains are expected to run at a high rate of speed. and you are not to hold the companies to a different liability in the jury box, from what you would if you were sitting as a passenger. This was practically an open country, as I have already said It is true there are houses there. I may misconstrue this locality, you have seen it, and know more about it than I do;—and there was nothing, if I am right about it, that called for a slowing down of this train as it approached this crossing by reason of its being built up about there, and according to the engineer, the steam had been shut off; the train was going down there—not down a very severe grade, simply by gravity. I will not stop over the matter of ringing the bell, that has been so positively testified to that it seems to me you have got to accept it. I doubt whether it would have been very effective in any event, under all the circumstances. The contention on the part of the plaintiff that should be urged upon you, as I understand, as a basis of the claim of negligence is, that the whistle was not blown. Where a railroad crosses a highway at grade, the railroad company, of course, has rights on it, and the traveling public, by wagon or by foot are also entitled to make use of it, and each must have due regard to the other. The railroad cars cannot get off the track; individuals can; therefore in a way and to a certain extent the individual must look out

for himself. But there is a certain measure of responsibility, of course, demanded of those who are running upon the railroad, and it is to be expected that a railroad train coming to a crossing at a reasonable and proper distance from it will give notice of that fact by blowing a whistle. People know this, and look out for it; it is the customary warning. The question is, whether it was given in this case. On the defendant's side we have the testimony of Milo Gardner, the engineer, and Mr. Mason the fireman of the locomotive of the defendant's passenger train, that at the usual place, at the whistling post, about 1400 feet to the south of this crossing, the whistle was blown in the ordinary way, two long and two short blasts. There was no statement as to this made by the conductor, baggage-man or brakeman on the train, because they were all inside, and were not noticing. But, confirming the testimony of the engineer and fireman, we have all the men who were in charge of the passing Jersey Central train, who all testified, to a man, that they heard this warning whistle given. Mr. Richards, the engineer, so testifies, and Mr. Becker, the fireman; Mr. Searfoss the brakeman, and Mr. Krebbs the flagman. I believe that they put the place somewhat nearer than the whistle post; for instance, Mr. Richards, the engineer of the New Jersey Central train, speaks of it as having been given about seven or eight hundred feet from the crossing. On the plaintiff's side, however, Mrs. Flannelly says she did not hear any whistle; that she listened for such a signal, and looked up and down the track before venturing across it. Charles Strubeck, who was on the caboose of the Lehigh Valley train says he heard no signal; and his cousin, William Strubeck, who

was with him, also did not. Neither did Gilfeather who was at work on the Hexter house near there; nor Roy Wallace who was with him; the only whistle they heard being the danger signal when the train was about on Mrs. Flannelly. Alice Aherns heard a whistle, but then the train was not far from the crossing; she says the whistle might have been given for the crossing, and she not hear it; and, quite significant, we have the testimony of William Whites, the sewing machine agent who was up making collections along the row of red houses, and he was up somewhere near where the head of the Jersey Central train would be, if I remember aright, where the people who were on that train met the other, the passenger train, and while they say that they heard the signal, he says that none was given, or that he heard no signal. As weakening, perhaps, his ooservation, it may be noted that he says he did not hear the danger signal either. Now, was there a warning given by whistle of the approach of this train at a place where it was to be expected, and where it would be effective, and notice of the coming of the train? Positive evidence on such a point, gentlemen, is much more satisfactory than what we call negative evidence. A person who did hear, is more apt to be correct than some one who said he didn't hear, because if the person didn't hear, it may be that the thing occurred even if he didn't: it depends upon how far his attention was directed to the matter. We all know the bells strike, and whistles blow, and we have our attention directed to something else, and we don't notice them; they pass with a thousand things that are going on around about us, our attention being directed to something else. The only value therefore of what I call nega-

tive testimony, of people who say they did not hear or did not see, is that their attention was attracted or directed to it, so that they would have seen or heard, if it had occurred, it seems to me, it is to be noted, that the only way we can prove that a thing did not occur, is by just such testimony; if there was no whistle blown, in this case, the only way you can show it is by those who were about there, and who did not hear it; the value of their saying they did not hear it depending, I say, upon whether their attention was directed to it, and therefore, taking all this testimony back and forth, it is for you to say whether a whistle was blown at a proper place by this oncoming passenger train? If it was, then there was no negligence on the part of this company to be attributed to them upon that score; if it was not, that would be a failure to warn people who were going across the track, who were about to make use of it, that would warrant a jury in saying they were negligent.

Should you find that the defendant company did all that was required of it upon that occasion, your verdict then would be in favor of the defendant. But, there is something more in the case than that. It is contended on the part of the company here that the evidence shows Mrs. Flannelly to have, herself, been guilty of negligence, and that it was by reason of that, rather than by any want of care on the part of the company, that this accident occurred, or, in other words, that without making proper observation of what was going on down in the direction from whence this train was coming, she drove on to the track, virtually driving in front of the oncoming train, and her wagon was struck. She says, as you will recall, that she first stopped about fifty feet

from the crossing at a place which was the usual stopping place for making observations. She says there was a train standing on the track nearest to her (that is what is spoken of as the idle track); and there are one or two other witnesses, I believe, who say the same thing, but the weight of the evidence is so decidedly the other way that I am sure you will not accept that statement, and I shall treat it as though that was not really the case. On the far track, however, was a Jersey Central freight train, which was passing in the direction of Pittston. Mrs. Flannelly says that she waited for it to clear the crossing. Wesley Sagor, this deaf young man, crossed ahead of her; and the train that was coming was so apparent to him that he stopped the butcher wagon that was on the other side from attempting to cross. The Jersey Central train, however, was hardly out of the way when Mrs. Flannelly drove on, to go across. She says that she stopped a second time, I believe, when she was about 12 feet from the easterly track, and looked again, and at that point she saw and heard nothing, and went on; but hardly was her horse on the track when this passenger train came into sight like a flash, as she says, out of the smoke and the dust; she gave her horse a hit, the horse stopped, seemed to rear or balk, and then she save it anotner hit, the horse getting across, but the engine coming down hit the back of the wagon. The criticism of her, and the charge of negligence which is made against her, which it is claimed prevents her from recovering here is, that she crossed before she had a clear view in the direction in which this train was coming. The freight train, as I have said, was going towards Pittston; there was a curve in that direction, and

this train being a long one, with these high box cars, it obscured her view of the track beyond; that I believe is the uncontradicted evidence. One of the photographs which have been put in evidence shows by the engine, which is standing as the passenger engine in this case was, just before the accident, about at a point where the head of the freight train would be, and another train is interposed there, so that this photograph is claimed to illustrate the condition that would confront this woman as she drove upon the track; or in other words, while she could look down the track for a certain distance, three, four or five hundred feet, if you believe her view was obstructed beyond that, and that was the critical part of the road which she needed to see. Mrs. Flannelly, herself, testifies, if I have understood her aright, that this train cut off her view until she got on to the second track, and the passenger train was right upon her, so that she could not escape. That, if I have recorded her testimony aright, is her own statement. Or, if you take it in its broadest sense, before she had a view that really amounted to anything that showed her what there was beyond, that showed her whether she could safely venture on the track, she ventured on, and the accident happened. If she went forward in that way, before she had made a proper observation, or taken a position to see what was coming, she took the risk, and the fault is her own; even though the company were negligent she could not hold them because her negligence would be such that it bar a recovery. It is useless for a person to say that they took care or to endeavor to persuade a jury that they did, if they drove on to a railroad track without looking, without listening, without using the senses which we are given for our

own protection. We know that trains run fast, and that a few hundred feet observation is of no practical use or advantage, and if that is all the far we can see when we drive on to a track, we cannot recover in a court of justice. This woman was bound to have a view that would amount to something, far enough so that she could see what was coming, and if she ventured across without that, she is convicted of negligence, and your verdict should be for the defendant. You must decide then, first, that the defendant company failed to exercise the care that they should have exercised upon that occasion, and that the injury resulted from that; and, second, that Mrs. Flannelly was free from contributory negligence, or negligence on her part, or you cannot find in her favor. Of course I cannot say how your verdict upon this point will be, and I will therefore briefly discuss the remaining question in the case, which is one of damages.

There is a serious conflict here. The plaintiffs claim that Mrs. Flannelly, one of them, has been not only injured, but permanently injured. They say she was frightened, shocked upon that occasion, as well as being thrown from her wagon, and her body bruised; that as a result of this a mis-carriage came about; following which her present condition has developed greatly; that she has a wry-neck; and a curved spine; that the flesh of her body has wasted under these circumstances, and that she has lost strength and the ability to take care of her ordinary affairs, where before she was more than usually active, competent and able to take care of the large family which she has, and do most of the work not only in the house but in the fields, outside of it. On the other hand it it is contended by the company that testimony of

physicians has been given to the effect that the wry-neck which she apparently has, could not be the outcome of what has happened, that it is to be attributed to an hysterical feeling, or hysteria, the fruitful source, as it is said, of supposed but unreal ailments. It is not contended that this good woman simulates this condition, but does it honestly. People under hysterical conditions, as I understand it, are in dead-earnest, they believe absolutely that to which they give the appearance. A person who thinks he is sick, under hysterical impulse, you cannot persuade him he is well; so that it is not necessary in the consideration of this case, if you believe the defendant's testimony with regard to it, to conclude that if Mrs. Flannelly is assuming or simulating or feigning a wry neck that she is actuated by anything dishonest, or that it is a matter gotten up for this case, that does not necessarily result at all, nor would your verdict to the contrary necessarily so convict her; but all this, of course, is a matter for you, having heard the testimony back and forth, it is for you to say whether she is injured, and to what extent she has been injured. Whether it is something that will pass away, or whether it is fastened upon her, likely to increase rather than lessen, in deciding upon the question of damage, the matter of compensation is to be kept in view, what would reasonably compensate these parties, assuming that the injury is of the character it has the appearance of; if she is permanently injured, of course the damages would be more than if she is only temporarily so.

You will notice that Mr. Flannelly, as well as Mrs. Flannelly, are joined together here as plaintiffs; each, according to the practice in such cases, asks a verdict at your hands, but the two things are to be

distinguished. The husband sues for what he has lost or been at the expense of by reason of her injury; he is responsible for the bills, of the doctors, and the nurse, or medicines, or for what he might be liable for in that line if her present condition should continue; these are to be considered and allowed for. On her part you have the suffering that she has endured, or that she is likely to endure, and the physicai effect upon her, the impairment of her body, particularly if it is permanent, or if it is likely to go on, or the contrary. Now, about this, I cannot advise you at all; you have got to use your best judgment, if the case reaches that phase of it, and decide as to each of these plaintiffs what would reasonably compensate or make up to them respectively for this injury.

As I have already endeavored to say to you, you are to remember that you are deciding between man and man; you are to be as considerate for the one side as for the other; you are not to let your minds be influenced by passion or prejudice but you are to be controlled by cool and dispassionate deliberation and judgment.

If you decide in favor of the plaintiffs, somebody has got to foot the bill. I mean to say it is not simply a corporation unaffected by the fact that that corporation is made up by individuals, it comes out of the stockholder's pockets—you, me, or somebody.

I will refer to some points which have been submitted. I think I have so far covered those on the part of the plaintiff that I will not stop over them.

Referring to those of the defendant, I will refuse the First, Second, Third, and Fourth, without reading.

" 5th. The undisputed evidence showing that in the absence of any obstructing trains the traveler upon the highway had a clear view of the track in the direction from which the train which is alleged to have caused the injury came, for a distance of more than fifteen hundred feet, the plaintiff, Mary Flannelly, if that view were temporarily obstructed by a passing train, should have waited until the train had progressed far enough to clear the view. If she started to cross immediately behind the passing train which obstructed the view, she took her chances of getting across safely, and if she failed was guilty of contributory negligence."

I have already endeavored to so instruct you, gentlemen, and I affirm this point.

" 6 Upon the question as to whether the proper signals were given by whistle and bell at the proper places, mere negative testimony of witnesses who say that they did not hear such signals, is of very little weight as in rebuttal of positive testimony, that such signals were given."

I have already endeavored to say that, and that point is affirmed.

The Seventh point I will refuse without reading.

" 8th. There is no evidence in the case that there were such dangers peculiar to the crossing where the accident occurred as would require the defendant to in any way limit the speed of the trains passing over that crossing."

That is a correct statement of the law.

"9th. The plaintiffs are not entitled to recover for any injuries, consisting of or resulting from mere fright, excitement or mental distress, in the absence of physical injury."

That is affirmed.

"10 th. If the jury believe from the evidence that the plaintiff, Mary Flannelly, jumped from the wagon before it was struck by the train and reached the ground without bodily injury, the plaintiffs are not entitled to recover, even though she may have suffered great mental distress resulting in hysteria or any other ailments."

That point is a little vague to me; if it means that she could not recover for mere mental suffering or distress, even though that went to the extent of hysteria, I think it correctly states the law. Beyond that, I hardly am prepared to go.

"11th. If the jury believe from the evidence that the immediate cause of the accident was the momentary stopping of the horse upon the tracks either of his own volition, or by reason of the act of the plaintiff, Mary Flannelly, the plaintiffs cannot recover."

That is to say, if the negligence was the negligence of the horse, (not of the people who were running the railroad) or Mrs. Flannelly; if that was the sole cause of the accident, there can be no recovery.

As I have said to you, you are to render two verdicts, if in favor of the plaintiffs, stating the amount of damages which you give to the husband, if anything, and also separately the amount of damages which you allow to the wife; and in that case I will ask you, as I have already said, to specify in what particular you find that the defendant company was negligent. If your verdict should be the other way, you simply will render one verdict that you find in favor of the defendant.

MR. TORREY.

Before the jury returns, Counsel for Defendant except to the charge of the court, in the following particulars,

1. The court erred in refusing the defendant's First point.

2. The court erred in refusing the defendant's Second point.

3. The court erred in refusing defendant's Third point.

4. The court erred in refusing defendant's Fourth point.

5. The court erred in refusing defendant's Seventh point.

THE COURT.

Let exceptions be noted, and bills sealed.

The foregoing paper is endorsed as follows:

U. S. Circuit Court
Middle District of Penna.
No. 124 January Term 1908.

John Flannelly and Mary Flannelly
vs.
The Delaware & Hudson Company

Charge of the Court

John Taylor.

IN THE

UNITED STATES CIRCUIT COURT,

Middle District of Pa.

JOHN FLANNELLY and MARY FLANNELLY vs. DELAWARE AND HUDSON COMPANY.	No. 124 January Term, 1908

Now, to wit: March 27th 1908, the defendant, by its attorneys Welles and Torrey, move the court to have all the evidence taken upon the trial duly certified and filed, and for judgment non obstante veredicto upon the whole record; particularly upon the refusal of the request of the defendant contained in its first four points for charge for binding instructions to the jury in favor of the defendant.

WELLES & TORREY,
Attorneys for Defendant.

The foregoing paper is endorsed as follows:—

No. 124 Jan. T., 1908.

John Flannelly, et. al.
vs.
Del. & Hud. Co.

And now, to wit, March 27th, 1908, upon motion in open Court rule for judgment non obstante

veredicto is granted as prayed for. Returnable sec reg.

R. W. ARCHBALD,
Dist. Judge.

Filed Mar. 27, 1908.
E. R. W. SEARLE,
Clerk.
September 30, 1908.

IN THE
CIRCUIT COURT OF THE UNITED STATES,
For the Middle District of Pennsylvania.

FLANNELLY vs. DELAWARE & HUDSON CO.	No. 124 Jan. Term, 1908.

Rule for judgment for defendant non obstante veredicto.

James H. Torrey for rule.

Paul J. Sherwood for plaintiff, opposed.

ARCHBALD, District Judge.

The jury found that the defendant company was negligent in not giving due warning by blowing the whistle of the engine, of the approach of the train to the crossing where the plaintiff was struck and injured, and I see no occasion to disturb that finding in view of the conflicting evidence on the subject.

The right to judgment, notwithstanding the verdict, depends therefore on whether the plaintiff was clearly convicted of contributory negligence on the undisputed evidence. It is said that she was, by her own testimony, that she drove right on to the track

where she was injured as soon as the train which was passing on the track beyond had cleared the crossing, without waiting until she got an unobstructed view in the direction from which the train that struck her was coming, the view being obscured by a curve in the track and the passing train being made up of high box cars. I confess that this was the impression I got at the trial and I charged the jury accordingly. But upon going over the Stenographer's notes I find that I was mistaken, or at least, it was not so clear, that I would have been justified in taking the case from the jury and directing a verdict, and if so I cannot now enter judgment notwithstanding it. The evidence of course was for the jury, unless so completely one way that there could be but one conclusion to be drawn from it. And the rule with regard to contributory negligence having been fully explained to them, it must be assumed that they properly applied it and found that the plaintiff did not drive on to the tracks until she had waited a suitable time so as to have a sufficient view and be able to make such an observation, as was required of her before doing so. Besides that it is uncontradicted evidence that the horse stopped or balked just as he got upon the track, without which the plaintiff would have not got safely over, the train as it was merely striking the hind wheel of the wagon. It was thus the unexpected action of the animal which really brought about the accident, the plaintiff having apparently started in sufficient time to get across if this had not happened, the train, according to her statement, not having yet come in sight. If therefore she was not negligent in starting to cross as the jury in this view of the evidence might properly find, there was nothing to stand in the way of a recovery.

And the rule for judgment non obstante veredicto must be discharged.

The foregoing paper is endorsed as follows:—
No. 124 January Term, 1908.

Flannelly
vs.
Delaware & Hudson Company.

OPINION.

Filed Sept. 30, 1908.
E. R. W. SEARLE,
Clerk.

IN THE
CIRCUIT COURT OF THE UNITED STATES
For the Middle District of Pennsylvania.

JOHN FLANNELLY and MARY FLANNELLY vs. THE DELAWARE AND HUDSON COMPANY.	No. 124 Jan'y Term, 1908.

PETITION FOR WRIT OF ERROR.

AND NOW COMES The Delaware & Hudson Company, plaintiff in error, defendant below, and says that a verdict of the jury was rendered in favor of the plaintiff and against the defendant on the twenty-sixth day of March, 1908. On the 27th day of March, 1908, plaintiff in error, defendant below, applied to this court for a rule for judgment non

obstante veredicto upon the whole record, which rule was allowed by the Court. Thereafter the testimony taken at the trial of the case was duly certified and filed and arguments were heard upon the rule for judgment non obstante veredicto and upon September 30, 1908 the rule was discharged, which it is contended upon the part of the plaintiff in error, defendant below, was in error and to the prejudice of the plaintiff in error, defendant below.

At the time of the discharge of the said rule for judgment there was pending a rule for a new trial granted to the defendant which was afterward, to wit, upon the 28th day of November, 1908, discharged and judgment was entered in favor of the plaintiff, Mary Flannelly, and against the defendant for the sum of two thousand (2000) dollars, and in favor of the plaintiff, John Flannelly, and against the defendant for the sum of five hundred (500) dollars, with interest from the date of the verdict, that being the amount of the verdict found by the jury.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the Circuit Court of Appeals for the Third Circuit for the correction of the errors so complained of and that a transcript of the record, papers and proceedings in this cause duly authenticated may be sent to the said Court of Appeals.

WELLES & TORREY,
Plaintiff in Error,
Defendant below.

Allowed,
R. W. ARCHBALD,
Dist. Judge.

Jan. 4, 1909.

IN THE
CIRCUIT COURT OF THE UNITED STATES
For the Middle District of Pennsylvania.

JOHN FLANNELLY and MARY FLANNELLY
vs.
DELAWARE AND HUDSON COMPANY.
No. 121 December Term, 1907

The defendant in this action in connection with its petition for a writ of error makes the following assignments of error, which it avers occurred on the trial of the cause, to wit:

First: The learned Court erred in refusing to answer affirmatively defendant's first request for charge to the jury; said request and the answer of the Court thereto are as follows:

> "First. Under all the evidence the verdict must be for the defendant."

Answer of the Court:

> "Referring to those (the points of the defendant) I will refuse the first, second, third and fourth, without reading."

Second: The learned Court erred in refusing defendant's second request for charge to the jury; said request and the answer of the Court thereto are as follows:

> "Second: There is no evidence in the case which would warrant a verdict in favor of the plaintiff."

Answer:

"Referring to those (the points of the defendant) I will refuse the first, second, third and fourth, without reading."

Third: The learned Court erred in refusing defendant's third request for charge to the jury; the said request and the answer of the Court thereto are as follows:

"Third: The evidence establishes no proof of negligence on the part of the defendant which would warrant a recovery in this case."

Answer:

"Referring to those (the points of the defendant) I will refuse the first, second, third and fourth without reading."

Fourth: The learned Court erred in refusing defendant's fourth request for charge to the jury: the said request and the answer thereto are as follows:

"Fourth: The evidence inclusively establishes negligence upon the part of the plaintiff, Mary Flannelly, which contributed to her injuries, if she received any, and therefore the verdict must be for the defendant."

Answer:

"Referring to those (the points of the defendant) I will refuse the first, second, third and fourth without reading."

Fifth: The learned Court erred in discharging the rule for judgment non obstante veredicto upon the whole record.

Sixth: Tho learned Court erred in not entering judgment for the defendant upon the whole record upon the rule for judgment non obstante veredicto.

The following is the evidence taken at the trial and is all the evidence taken at the trial upon which the defendant's points were predicated and is the whole record brought before the court for review upon rule for judgment non obstante veredicto.

IN THE
CIRCUIT COURT OF THE UNITED STATES
Middle District of Pennsylvania.

JOHN FLANNELLY and MARY FLANNELY, residents of Pennsylvania.	No. 124 Jan. Term, 1908.
vs.	
THE DELAWARE & HUDSON COMPANY.	Action: Trespass.

The above case came on for trial, at Scranton, Pa., March 23rd, 1908, before Hon. R. W. Archbald, District Court Judge, and jury.

APPEARANCES:

For Plaintiffs: Paul J. Sherwood, Esq., Wilkes-Barre.

For Defendant: Messrs. James H. & Wm. J. Torrey, of Welles & Torrey, Scranton.

PLAINTIFFS' EVIDENCE.

MRS. MARY FLANNELLY, Plaintiff, Sworn.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mrs. Flannelly, you are one of the plaintiffs in this case?

A. Yes, sir. On the 30th of July, I left my home about 9 o'clock—

Q. Just a moment—You were injured on the 30th of July?

A. Yes, sir.

Q. What year?

A. 1907.

Q. How old a lady are you now?

A. 43 past—past 43.

Q. When were you 43?

A. In July.

Q. Last July?

A. Yes sir.

Q. Where were you going the day you were hurt?

A. Going to Pittston.

Q. What were you driving?

A. One horse, hitched to a light lumber wagon.

Q. Who, if any one, was with you?

A. My little boy, and Howard Toohill.

Q. Your little boy and Howard Toohill?

A. Yes sir.

Q. Now, we will pass on down, until we come to go over the crossing. Do you remember driving up the road and approaching the crossing of the Delaware and Hudson Company?

A. Yes sir.

Q. What railroad did you cross before coming to the Delaware and Hudson road?

A. Crossed the Lehigh Valley.

Q. Where was that with reference to the crossing where the accident occurred?

A. I should say about five or six hundred feet, maybe eight hundred feet.

Q. Down in the hollow?

A. Down in the hollow, at the foot of the hill.

Q. You crossed that track, did you?

A. Yes sir.

Q. You never measured it?

A. No, sir.

Q. You then drove, after crossing the Lehigh Valley, up toward the crossing where you received your injury?

A. Yes sir I did.

Q. About what kind of a highway is that up along the hill there?

A. I should judge it is slanting in that shape (indicating.)

Q. Is it a dug road?

A. A dug road on the side of the bank.

Q. With a bank below you?

A. Yes sir.

Q. Any kind of rails, or fences up there?

A. No, sir, nothing at all.

Q And on the upper side, as you approached, is a bank extending up the railroad?

A. Yes sir.

Q. What did you do as you got up near the track?

A. I stopped at the usual stopping place, until we saw this this train coming around the curve; it was a long box train, coming up Avoca, going toward Pittston, and there was one going on the 4th track, was a heavy box train. It was going very slowly and we took the pains to wait, and after this train passed the crossing, quite a little ways down toward the shanty, we drove to the first track, and I stopped there, and looked and listened up and down the track but couldn't see or hear anything; no signal of any kind, and we drove on to the track, and when

the horse was on the second track over to the middle of the second track I saw the smoke, quite a bit, somewhere on down toward the viaduct—I saw an engine pull out of this smoke just like the shot out of a gun, it was coming as fast as it could, and the horse kinder pranced, and I hit him with the whip, and he didn't go, and I hit him again, and the train by that time come along and struck the hind wheel and smashed the wagon, and I don't know any more about it—and pitched us, and killed Howard Toohill.

Q. Now at the time you first stopped, as you say, that was at the usual stopping place?

A. Yes sir.

Q. Whether or not you had a view down the tracks—Pittston way?

A. Yes sir. There was a clear view down.

Q. Was there any train in sight anywhere between you and the cars down that way at that time?

A. No, Sir, I couldn't see any.

Q. And after this train had gone on, and passed the crossing, or by the way, which track was this Pittston bound train on?

A. On the first track towards me.

Q. On the track nearest you?

A. Yes sir.

Q. How many tracks are there in all?

A. Four.

Q. How is the lay of the public highway, as it goes across the railroad, is it level, or up-hill?

A. It is up-hill.

Q. About how far back from the crossing did you make your first stop?

A. I should judge about 50 feet—fifty or forty feet, I could not just say.

Q. About how far back was the horses head?

A. It would be about twenty feet.

Q. And where was it you said you made the second stop?

A. Right—the horse's head was right on the first track—at the first track—may be the second track.

Q. Now, as you drove on from the place w here you stopped, what if anything did you do by way of looking and listening?

A. I looked up and down the track very carefully, and listened too, so that I could hear any signals, or any danger coming towards me—I always—I was always careful to do that.

Q. Were there any signals of that approaching train that struck you, given?

A. No, sir.

Q. And, as I understand you, your horse was upon the second track when the train first came in sight?

A. Yes, sir.

Q. That was down near the viaduct?

A. Yes, sir.

THE COURT.

Q. From which direction did the train come?

MR. SHERWOOD.

Q. Upon which track was the train that hit you?

A. On the second track—The centre track.

Q. How many D. & H. tracks are there there?

A. Three.

Q. And the first one is where the freight train was on?

A Yes, sir.

Q. And the second one was where the passenger

train came up, in the Pittston direction—going north?

THE COURT:

Going which way?

A. Going north, going to Scranton.

MR. SHERWOOD:

Q. Are there any safety gates or anything of that sort at the crossing?

A. No, sir, no safety gates, no watchman, or bells, or anything there.

Q. No signals?

A. No signals or anything there.

Q. Do you know what effect it had upon the wagon; did it destroy it?

A. I saw it since—what I saw of it—I saw the wheel and the hind part of it all smashed into pieces—what I saw of it since.

Q. Now, at the time of that injury, and before, what was the condition of your health?

A. I had good health, and good condition, good health.

Q. Was your spine and back straight before that injury?

A. Yes, sir.

Q. Was your neck straight then?

A. Yes, sir, perfectly straight.

Q. What is the next you remembered after the wagon was struck—where were you?

A. I cannot tell you.

Q. Can you tell us where you next recall anything?

A. I can recall Mrs. Martin Promerick coming to me, and one man, I don't know who the man is came to me; I never knew who the man is yet; he

came to me and put his hand on my shoulder, and I know the man advised me; he tried to get me to realize something, but I didn't know.

Q. Where were you taken to if you recollect?

A. To Mrs. Fleits' home.

Q. With reference to the place of the accident where is it, is it right there in the village?

A Yes, sir—where our wagon is.

Q. Do you know how long you remained there at the house?

A. Until seven o'clock in the evening, I understand.

Q. And finally you were taken home?

A. Yes sir.

Q. That same night?

A. Yes sir.

Q. How far did you live from that point?

A. Three miles.

Q. When you were taken home, what was done with you?

A. I was put to bed.

Q. For the next few weeks what was your condition?

A. I can hardly tell you.

Q. Well, tell us the best you can?

A My voice was gone, so I couldn't speak to anybody, and I hardly realized any of them, and then I was on the Fourth, because I was taken sick with confinement—three months—on the 4th of August about 12 o'clock at night.

Q. Mis-carriage?

A. Yes sir.

Q. Three months gone?

A. Yes sir.

Q. At the time of the accident you were pregnant?

A. Yes sir.

Q. What was your condition of health, from that time to the present?

A. Well, I have to have some one to home all the time, and I get no rest nights at all.

Q. Have you been in bed most of the time?

A. Most all the time, off and on – I can get no rest nights, no rest.

Q What is some of the sufferings you feel—can you tell us?

A. Right between my two shoulders, and I have always got such a drawing back, all the time, and right here on the side—there is always such pain.

Q. You have a drawing back?

A. Yes, my head goes this way (indicating) always—My hands, I cannot keep them still, and I cannot keep my fingers still—I never can keep my hands still.

Q. Do you suffer much pain?

A. Yes sir, I suffer yet.

Q. How much of the time have you suffered pain from the time of the accident?

A. I have suffered pain up till now.

Q. Have you been able to do any work at all since the accident?

A. Not any more than darn stockings, and sit around the house, and do a little bit of mending or something of that kind, to ease my mind a little bit.

Q. What family have you?

A. Ten children—nine living and one dead.

Q. How many of them are at home?

A. Nine (9)

Q. What is the age of the youngest?

A. Five years next month—Five years in April.

Q. What doctors have you had treating you?

A. Dr. Pier and Dr. Butler.

Q. How much of the time have you been in bed?

A. I was in bed till August—all August—in the middle of September I got up—in the middle of September I was able to sit up a little bit.

Q. You were in bed from July to September?

A. Yes sir.

Q. And, since that time?

A. I have been in bed, and out of it.

Q. In and out?

A. Yes sir.

Q. Did you have a nurse at any time?

A. Yes sir

Q. What is her name?

A. Mrs. Susan Thomas.

CROSS EXAMINATION.

MR. TORREY.

Q. Mrs. Flannelly, just where is it you live?

A. We live three miles from Dupont—Langan, it is called—in Pittston township.

Q. That is south-east from this crossing, is it not?

A. Yes sir.

Q. A south-easterly direction—How long have you lived there?

A. Living there ten years.

Q. How far is it from Pittston?

A. I should think about 5 miles.

Q. How far is it from Wilkes-Barre?

A. I never—I have never measured the miles, or had any one that spoke of the amount of miles.

Q. You used to drive to Pittston frequently, did you not?

A. Yes sir I did.

Q. And you frequently crossed this crossing?

A. Yes sir I did.

Q. Very well acquainted with it.

A. Very well acquainted with it.

Q. Do you know what that little groupe of houses is that is over across the gulley to the east of this crossing—do you know what they call it?

A. Dupont.

Q. Is that Dupont?

A. ———

Q. Right across the hollow there, is that called Dupont?

A. Where do you mean, across the track, or across the creek?

Q. Across the creek?

A. It is Dupont I guess, as far as I have heard it called Dupont.

Q. Then you would come through Dupont and down into this hollow, and up the hill across to the crossing?

A. Yes.

Q. And you would come north, toward the Heidelberg breaker to get to Pittston?

A. Which Heidelberg?

Q. Do you know where the breaker is—or did you come southerly after you get across there—which way would you turn after you get across the crossing, to the right or the left?

A. Would go south to Pittston.

Q. Then it is southerly?

A. Yes.

Q. And Pittston was the first town you struck in going that way, was it not?

A. Yes, sir.

Q. That is about two miles?

A. Yes, sir,

Q. There is another crossing of these tracks, another road, just about where you could see down this railroad track, isn't there?

A. Yes, sir.

Q. How far is that—about 1500 feet or so?

A. I could not tell you as to the amount of feet.

Q It is in sight?

A. It is in sight from that crossing, yes.

THE COURT.

What is that which is just in sight?

MR. TORREY.

The other road which crosses the valley there.

Q. That runs over to Pittston too, does it not?

A. Yes, sir. We go to the post-office down our road.

Q. What time in the morning did you leave home?

A. Around nine o'clock.

Q. This little Toohill boy had been visiting at your house?

A. No, sir, he had been boarding there.

Q. For how long?

A. Seven weeks.

Q. And you were taking him back home?

A. He was going down home to visit his parents.

Q. Was that the purpose of your going to Pittston, to take him home?

A. No, sir, it was not my purpose there.

Q, What was your purpose?

MR. SHERWOOD.

I object to that.

MR. TORREY.

Q. Were you just going over for business?

A. Yes, sir, I was goiug on my own business.

Q. The Lehigh Valley Railroad, you say, is about 600 or 800 feet from the D. & H.?

A. As far as I can tell you about the number of feet—I could not tell you if I was put to measure it.

Q. You never measured that at all?

A. I had no reason to.

Q. No trains interfered with you in crossing the Lehigh Valley I presume?

A. No, sir.

Q. You didn't see any train on that road, did you?

A. No, sir, not while we was there.

Q. Not while you were there?

A. No, sir, but when we were waiting between the track, at the usual stoppiug place, there was a train went down, and a train went up on the Lehigh Valley while we were waiting.

Q. Do you remember that distinctly?

A. While we were waiting there.

Q. What kind of trains were there?

A. I could not tell you whether—there were so many cars to one engine, but it was a heavy train, coming down, but what was on the other I could not say, to say positive—there was an engine, coming up; there was two engines passing.

Q. How did you happen to be noticing this train behind you at that time?

A. We were standing—the wagon had been in, standing, on the usual stopping place; it didn't stop straight; you have to stop side-ways—from the puffing of the engines—

Q. Weren't you watching the Delaware and Hudson pretty closely?

A. Yes, sir, but I could hear the trains coming up and down behind me—I can tell the sound of one train and another.

Q. You didn't look close so as to tell what they were?

A. No, sir, I didn't look close to tell what they were.

Q. You say while you were stopped there before you went on the track, that a train passed on the D. & H. on the nearest track to you?

A. Yes, sir.

Q. You are very sure about that?

A. I know the train passed on that track.

Q. It was going towards Pittston?

A. Yes sir.

Q. That is, going southerly?

A. Yes, it was going towards Pittston.

Q. Was it a freight train?

A. I don't know what was in it, it was a box car.

Q. Box cars?

A. Yes sir.

Q. Did you see any of the crew of that train?

A. No, sir.

Q. You didn't recognize any of them?

A. Didn't recognize any of them.

Q. The last car that crossed over was a caboose, was it not?

A. It was a caboose.

Q. Can you give any idea how many cars there were?

A. No, sir I could not—I know it was a long, long train; I could tell from the time we stopped it was a long train, we had quite a wait there—we waited quite a little while.

Q. Now, cannot you possibly be mistaken, and was not that train upon the third track instead of the first track?

A. No, sir, I cannot be mistaken.

Q. You are very sure about that?

A. No, sir I was struck on the second track.

Q. I say, wasn't this freight train that went down, upon the third track?

A. No, sir, it wasn't.

Q. How many trains did you see, during all the time that you were there—outside of the Lehigh Valley—upon this crossing I mean?

A. I saw one train going south on the D. & H. down; I saw one train on the 4th track, I don't know who it belonged to, going north.

Q. And the passenger train?

A. Those both were on the crossing at the one time.

Q. And the passenger train?

A. And the passenger train came while we were on the crossing.

Q. The freight train, you say, was on the first track?

A. Yes sir.

Q. The Lehigh Valley train on the fourth track?

A. Yes.

Q. And the passenger train on the second track?

A. Yes sir.

Q. You didn't see any train at all going on the 3rd track?

A. No, sir, I didn't see any.

Q. There wasn't any train passed there at all on the 3rd track?

A. No, sir, I didn't see any.

Q. How far had the train that was on the track nearest to you gone over the crossing, before you started to go over?

A. Towards the shanty.

Q. What do you say?

A. Towards the shanty—the flag shanty, some kind of a shanty was there—There was a little shanty there.

Q. Would you say it was a hundred feet?

A. I could not say that, it might have been more than a hundred feet; I couldn't say that for certain.

Q. Would you say it was as much as 200 feet?

A. I might if I was there and took an interest; I haven't been there and took an interest of it since.

Q. You started to go across that track?

A. Yes sir.

Q. This train which was going down on the track nearest to you cut off your view, way down the road, did it not?

A. Yes sir, cut off my view until I got on the second track—when the horse was on, and the engine pushing right towards me from up the valley - I couldn't make escape.

Q. And when you got so that you could look past the train that was going south, then you looked down the track?

A. I looked carefully up and down---carefully.

Q. And it was then that you saw the passenger train coming?

A. Yes, sir, it was then that I saw the passenger train.

Q. How far off was it then?

A. Towards the viaduct; the viaduct was the most thing I could see, coming through a cloud of smoke and steam, and it approached to me like a streak of lightning.

Q. Then when you saw it, you say you tried to whip up your horse?

A. Yes, sir; there was no way to get ahead or back up; if I backed up we would have been all under the engine.

Q. What did the horse do when you struck him?

A. He stood for a minute as if he was frightened, and pranced and reared, and I hit him again, and when I hit him he gave a step across the track, and the engine came and hit the wagon and flung the wagon---

Q. Is it not a fact, Mrs. Flannelly, that before the engine struck the wagon you jumped out of the wagon on one side, and your son jumped out on the other?

A. No, sir, I didn't know what became of us; I didn't know what become of me.

Q. Did you not jump out of the wagon?

A. I don't know what become of me; all I know is that the engine came and I screamed, but what became of me I don't know.

Q. You cannot tell?

A. I cannot tell what I did.

Q. And, so far as you know, the engine didn't hit you?

A. Something must have hit me, when I was all marked up. If the engine had hit me it would certainly kill me.

Q. Then you think it didn't hit you?

A. If the engine hit me personally I would have been killed.

Q. Where were you when you first recovered consciousness---standing up, or sitting down?

A. By the time they took me home I realized a little; I knew my oldest boy—just before they took me home—

Q. That is when you were at Mrs. Fleits'?

A. Yes, sir.

Q. You didn't know anything before that?

A. I was, I guess, crazy.

Q. Didn't you say a little while ago that some man helped to lead you?

A. No, sir, I didn't say it; I said I could remember a man coming to me, but I didn't realize who the man is.

Q. I say, there was a man came to you while you were on the tracks there?

A. While I was on the tracks.

Q. You were standing up then, at that time?

A. No, sir, I was sitting down—that is what they told me—I was on the side of the bank.

Q. Then you were not on the track?

A. No, sir, I was sitting on the side of the bank.

Q. Mrs. Flannelly, what doctor had you?

A. Dr. Pier.

Q. What is his first name?

A. Dr. Pier.

Q. Was he your family physician?

A. Yes, sir.

Q. And he was the only physician you had, was he?

A. At that time, until about two months, thræe months, I had Dr. Butler for my nerves.

Q. Two or three months ago?

A. Yes, sir, I had to have Dr. Butler for the nerves.

Q. What was your husband's business?

A. He is a farmer.

Q. And prior to this accident, did you employ a servant?

A. Yes, I had to take my own daughter out of service.

Q. I say prior to the accident, did you have any servant?

A. Yes, Mrs. Thomas.

Q. What part of the house work did you use to do before this accident?

A. I did all my housework.

Q. You did all your house work?

A. Yes sir, I could do any kind of house work, and I sewed for ten in family, and I think I did quite a bit, and do the house work.

Q. Do you say you have done no work since then?

A. No, sir.

Q. Of any kind?

A. No, sir, I didn't I am not able to do it.

Q. Have you done any baking?

A. No, sir I didn't do any baking.

Q. Or washing?

A. No, sir.

Q. Do you kæep cows?

A. Yes sir.

Q. Did you make butter there?

A. Yes sir.

Q. When did you first see the freight train on the Delaware & Hudson, which you say was on the first track, and which was coming south?

A. Coming around the curve.

Q. That was to the north of you, and to your left?

A. Yes.

Q About how far away would you say it was?

A. I should say about—to my judgment—may be 20 feet from the crossing.

Q. That is—to your right, I mean, and not your left—I don't wish to mislead you?

A. Yes

Q. It was going right straight along, was it?

A Yes sir, going very slowly along—heavy.

Q. You hadn't seen it approach, as you were coming up the hill?

A. Sir?

Q. Hadn't you seen it or heard it as you were coming up the hill, before you got to the top of the hill?

A. We heard it before we got to the usual stopping place—we could see the steam of it, coming.

Q. Which train?

A. The first freight train.

Q. And that came straight along?

A. That came along very slowly.

Q. About what time of day was it, when you had this accident.

A. As near as I could judge, around eleven o'clock.

Q. It wasn't a stormy day, was it?

A It wasn't a stormy day, but kind of smoky, cloudy day.

Q. There was no rain?

A. No, sir, no rain.

MR. SHERWOOD

Q. About how long, Mrs. Flannelly, when the horse shied there, as you spoke of it, or reared; could you give us some practical idea about how long it delayed you?

A. Well, may be from five to ten seconds—I could not say just.

CHARLES STRUBECK, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mr. Strubeck, where do you live?

A. Ham-town, Pittston, Pa.

Q. How old a man are you Mr. Strubeck?

A. 18 years.

Q. Did you see this accident?

A. Yes sir.

Q. Where were you?

A. On the Valley train.

Q. You mean the train on the Lehigh Valley track?

A. Yes.

Q. As Mrs. Flannelly approached the crossing, that would be the 4th track from her, the last track she would have to go over?

A. Yes sir.

Q. What part of the train were you upon?

A. The hind end.

THE COURT.

Q. You say that would be the last track she would have to go over?

MR. SHERWOOD.

Yes, your honor—I will show you the map (Exhibits map to court)

Q. The hind end of the Lehigh Valley train you say, that was going toward Avoca?

A. Yes sir.

Q. Where was the hind end of that train at the time the accident occurred?

A. I could not say—it must have been at least 50 or 100 feet away from the crossing.

A. That is, on the Avoca side?

A. Yes.

Q. Were you on the hind car?

A. Yes sir, on the caboose.

Q. On the end of the caboose?

A. Yes sir.

Q. Who was there with you?

A. My cousin.

Q. What is his name?

A. William Strubeck.

Q. Tell me what you saw of the accident?

A The only thing I saw of her was—I don't know whether she fell or jumped, or what she did, from the wagon; I don't know whether she got knocked off or not—I saw the engine was between the viaduct and the whistle post.

Q. That is the engine of which train?

A. The passenger train.

Q. How did that passenger train come toward the crossing?

A. I could not say—it was pretty quick anyhow; it happened very quick.

Q. Did it run rapidly, or slowly?

A. Yes, it was running pretty lively.

Q. You say you saw it at the time you saw her

falling or getting out of the wagon between the whistle board and the viaduct?

A. Yes sir.

Q. Now what other train did you notice there, besides the one you were on?

A. I noticed the train on the 4th track.

Q. That is the 4th track from you?

A. Yes the 4th track from me.

Q. That would be the first track she came to in driving across there?

A. Yes, sir.

Q. Where was that train?

A. Just above the shanty, a little ways, I could not say rightly how far it was.

Q. You mean the hind end was somewhere between the shanty and the crossing?

A. Yes sir.

Q. About at the shanty, when you saw it. What kind of a train was this on the 4th track?

A. Freight train; high cars.

Q Was it moving?

A. Yes sir, moving slowly.

Q. Do you know about the arrangement of the tracks as they were there at the time of the accident?

A. It was a kind of a branch railroad then, they have had it changed now, it is different now.

Q. That road where this freight train was, was a branch road, was it?

A. Yes.

Q. Where did the branch start from—this way, now?

A. From Heidleberg No. 1, and run to Yatesville, I think, I could not say.

Q. Which railroad is now the branch?

A. The third—that is, coming from Dupont.

Q. That would be the third one she would pass over?

A. Yes sir.

Q. At that time, was it a main line?

A. Yes sir.

Q. And now it is a branch; and the first one she came to was a branch track?

A. Yes, branch track.

Q. And now it is what?

A. A main line.

Q. Do you know about when, after this accident, they made those changes?

A. No, sir, I could not say.

Q. Do you know what that branch line was used for?

A. Branching cars of some kind—freight cars.

Q. On which track was the train that struck Mrs. Flannelly?

A. On the middle track.

Q. What part of her rig was struck?

A. The hind part.

Q. Was the horse hit?

A. Not as I know of.

Q. The horse and wagon got across, did they not?

A. Yes, the front wheels of the wagon was across the track, and the hind part was hit with the train.

Q. The horse was over the track?

A. Yes, sir,

Q Where was the horse, with reference to the tracks, when you first saw the train coming in sight, down by the viaduct?

A. He had his front feet on the middle of the track when I saw it.

Q. Do you recollect seeing her hit the horse with the whip?

A. No, sir, I didn't.

Q. What signals, if any, were given by the train that struck her?

A. I didn't hear any at all.

Q. Have you good hearing?

A. Yes sir.

Q. You lived there beside that track for how many years?

A. All my life time—I was born there.

Q. Any kind of warning appliances at that crossing—any safety gates?

A. No, sir.

Q. Any flagman?

A. No, sir.

Q Electrical signal?

A. No, sir.

MR. TORREY.

You don't need to ask much about that —it is admitted there are none.

CROSS EXAMINATION.

MR. TORREY.

Q. Where did you get on this train?

A. At the Valley, at Heidleberg No. 2.

Q. What direction is that from the crossing?

A. That is towards the right, towards the left—towards Pittston?

Q. Heidleberg No 1 is up to the right?

A. Yes, towards Avoca.

Q. What were you on the train for; had you any duties there?

A. I was looking for work.

Q. You were not working then?

A. No sir, not at the present time.

Q. Were there any of the train crew on there?

A. There was the brakeman inside of it, of course I don't know who they were; there was nobody on the hind end with me only my cousin—first cousin.

Q. You say you live somewhere about there?

A. Yes sir, below, towards Pittston, a short distance.

Q. How far from this crossing?

A. I could not say rightly—pretty close to a mile, I could not say rightly how far it is.

Q. Is it nearer to the crossing than the viaduct?

A. Yes sir.

Q. How much further—as far again?

A. About as far again.

Q. As you came up you saw this other freight train going down?

A. Yes, sir.

Q. That appeared to be a regular train, didn't it?

A. The passenger train was the only one I seen, after I was on the hind end, after we stopped on the Valley I saw that freight train moving—freight train moving slowly along; of course I didn't pay any more attention to the passenger train; I didn't think it would make any trouble, until, after, I heard someone scream, and I looked.

Q. I say, when did you first see this D. & H. freight train?

A. When she was just passing over the crossing.

Q. Where were you then?

A. I was on the hind end of the train.

Q. Where was the caboose.

A. We were right over the crossing a short distance.

Q. Then you passed over about the same time —the two trains?

A. We were over it, I guess, when that other freight train passed.

THE COURT:

Were there two freight trains passed on the D. & H.

A. No, sir, not as I know of.

MR. TORREY.

Q. I am speaking of the Lehigh Valley, and the D. & H.—The D. & H. freight was going towards Pittston?

A. Yes sir.

Q. Now, don't you know that that D. & H. train that you saw—that freight train, was on the track next to you, that is, on the third track?

A. No sir I didn't see any trains next to me at all.

Q. There were only three trains in sight during the time of this accident—The D. & H. freight, the D. & H. passenger and the Lehigh Valley that you were on, those are the only three trains that were there?

A. That is all I seen, yes.

Q. And you feel very sure that that D. &. H. freiget train was on the furthest track from you?

A. Yes, sir, I am most sure of it, for I seen it there.

Q. Then, just as soon as that freight train got over the crossing, Mrs. Flannelly started up to drive over, did she?

A. I didn't see her start to drive at all.

Q. The first you saw of her, she was jumping out of the wagon?

A. Yes, sir—I don't know whether she was jumping, or falling or what it was, it, happened so quick; I could not tell what it was.

Q. Mr. Strubeck, to whom did you first talk about this case?

A. To Mr. Sherwood.

Q. When did you talk to him about it?

A. Well, I couldn't say what date it was.

Q. Was it recently?

A. What is that?

Q. Was it recently, within a few weeks?

A. Yes, sir.

Q. And were you as sure, before you talked with him, as you are now?

A. Yes, sir, every bit.

Q. You would not object to my finishing my question, would you, Mr. Strubeck?

A. No.

Q. Were you as sure before you talked with him as you are now, that this freight train was on the 4th track, and not on the 1st track next to you?

A. Yes, sir, that is the only track I seen the train on—the freight train.

WILLIAM STRUBECK, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mr. Strubeck, where do you live?

A. Railroad Street, Ham Town, Pittston.

Q. You are a cousin to the last witness upon the stand?

A. Yes sir.

Q. And you were with him on the day of this accident, and saw this accident?

A. Yes sir.

Q. Where were you located---what were you riding upon?

A. The Lehigh Valley switch engine.

Q. The caboose?

A. Yes sir.

Q. Was that train a loaded train of cars?

A Yes, sir, loaded cars, pulled up from Heidleberg No. 2.

Q. And that train had come up from Pittston way, along up on the 4th or the Lehigh Valley track, and passed this crossing in question?

A. Well, I will tell you—we was on the switch engine coming from No. 2, on the 4th track; there was a Jersey Central coming up on the D. & H., on the first side, the first side towards us, at then at that time there was this woman here leaving this train pass, and leaving the switch engine pass about 50 feet the other side of the crossing, and the Jersey Central past about 100 feet to the other side—we weut up the track a little ways; she waited until there was another train going by on the Lehigh Valley, and she was kinder puzzled up with these trains, and she stood there a minute; I didn't take notice of the passenger train, there was so much smoke; and I seen the Jersey Central on the first track and I seen the Passenger coming out of the smoke cloud, and she was driving up on the track at that time.

Q, Was she upon the track when you first saw the train?

A. No, sir, she wasn't quite upon the track then

Q. Which track was she on?

A. On the furthest track—there was a coal train standing on the switch track—the furthest track over.

Q. About where, as near as you can recollect, at the moment—at the immediate time of the accident, was the hind end of that coal train?

A. Well, about 150 feet from the crossing—about 200 feet from the crossing.

Q. Of course you didn't measure it?

A. No, sir, I didn't.

Q. That was the train that was upon the first track when she came up?

A. No, sir, it was—yes, sir, it was the train on the first track.

Q. And were those high cars?

A. Yes, sir, big cars—the coal train standing on the first track to this woman.

Q. And you also saw a freight train about that time, on the 3rd track?

A. The Jersey Central track—the first track to me next to the Valley.

Q. Which would be the third track from her?

A. Yes sir.

Q. That made, in all, how many trains besides the passenger train, right there?

A. The passenger train—two.

Q. Besides your train?

A. Three besides the coal train that was standing there.

Q. The freight train coming this way?

A. Yes sir.

Q. And the two heavy trains which were going—

MR. TORREY.

I wish you would let him testify.

A. Coal train standing—that was the switch-back train.

Q. That was the closest train to her—now what other trains?

A. The Jersey Central, the closest train to me, going towards Wilkes-Barre.

Q. What kind of a train?

A. Freight train.

Q. And what was the train you were on?

A. Lehigh Valley switch engine.

Q. And that was going which way?

A. Towards Duryea, going towards the junction.

Q. That made how many trains in all?

A. Three trains.

Q. Beside the passenger train that struck her?

A. Yes sir.

Q. Now, you say that the woman was about on the first track or her horse was on the second track when you saw the passenger train coming?

A. Yes sir.

Q. Where was the passenger train at that time?

A. It was about five or six hundred feet away from us.

Q. And coming, as I understand you, through a cloud of smoke?

A Yes.

Q. Was it coming rapidly?

A. Yes, a mile a minute,—about that rate anyhow.

Q. Did it give any signals?

A. No, sir, not as I could hear.

Q. Have you good hearing?

A. Yes, good hearing.

Q. Was there any kind of a guard, or watchman at that crossing, stationed there?

A. No, sir, never.

Q. You drove teams there for a coal company, did you not?

A. Yes, sir, the Lehigh Valley Coal Co., Heidleberg No. 1.

Q. What do you know about that being a much used crossing?

A. Always has been in big use.

Q. How does it compare with the other crossings, above and below?

A. —.

MR. TORREY.

I object to the question.

Q. As to the amount of traffic?

THE COURT.

That is not material.

MR. SHERWOOD.

Q. How often is it used there by the railroad companies?

A. Well, pretty near every minute in the day, there is trains running all the time.

Q. How is it used by the general public—traveling public?

A. Well there is always something going on there—there is always people walking and riding, both.

Q. Does the highway cross these railroads on a level or was this woman driving up a hill?

A. Up grade.

Q. And before she reached the stopping place, at that point, she would be down below the tracks?

A. Yes sir.

Q. Like going up along here (indicating)?

A. Yes, it is down grade.

Q. And the railroad is on the crest of the hill?

A. Yes she was standing on the down grade, yes sir. She couldn't look over them box cars and see that passenger train.

Q. Then, the passenger train, as you saw it, came right along in between that train, on each side?

A. Yes.

MR. TORREY.

I object to that, and ask to have the answer stricken out.

MR. SHERWOOD:

All right, I withdraw the question.

Q. Explain to me, how that train came?

A. There was a coal train standing on the one track near to her, and freight train on this track coming up—Scranton to Wilkes-Barre, furthest side, and the other coal train was standing on the 4th track over.

Q. How long had it been standing?

A. That train was just going to slow up, going to stop for some Heidleberg branch cars.

Q. They were all puffing and working at the same time?

A. Yes sir.

CROSS EXAMINATION.

MR. TORREY.

Q. What is your business?

A. Driving team for Heidleberg No. 1 colliery.

Q. How long have you been working there?

A. Maybe 4 months,

Q. What was you doing that day?

A. I was going to Joseph Glennons, in his brewery, at the junction, in Pittston.

Q. Did you see any one on the train?

A. No, sir.

Q. You didn't see any of the train crew?

A. No, sir, there was a brakeman inside, but he wasn't outside with me.

Q. He didn't know you were there?

A. No, sir.

Q. You didn't have any word with him?

A. No, sir.

Q. Were you hiding?

A. No, sir.

Q. Why wouldn't he know you were there?

A. He didn't know we were there, we was on the hind end.

Q How did you know that he didn't know?

A Oh, he may have knowed it.

Q Were you standing up on the outside platform?

A. Yes.

Q. Did you know the members of that crew?

A. No, sir.

Q. Didn't they have to run to your breaker all the time?

A. Yes sir, but that is not the same crew that runs there now.

Q. You don't know any of them?

A. No, sir.

Q You say it is not the same crew that runs there now?

A. No.

Q. How long had that crew which was there that day, been running on that train?

A. They have been running quite often—this crew changes—this crew doesn't always run in there,

they change; sometimes the same crew goes in there again.

Q. You say you got on this train that you were riding on, at Heidleberg, No. 2?

A. Yes sir.

Q. How many cars were in that train?

A. I could not tell you; it was a pretty long string.

Q. Can you give us a guess as to how many you think there were?

A. Well, about fifteen.

Q. What kind of cars?

A. High cars, low cars, box cars and all kinds of cars.

Q. Coal cars?

A. Yes, sir.

Q. As the train went along—which was the freight, what was the first number of the train?

A. What is that?

Q. Was the locomotive at the front end or at the rear?

A. At the front.

Q. Was the head end of the locomotive going forward?

A. Yes.

Q. It wasn't backing up then?

A. No, sir.

Q I am referring to the train you were riding on?

A. Yes, going towards Coxton.

Q. You are sure it was not backing up with the tender ahead?

A. No, sir.

Q. You are sure of that?

A. Yes, sir. I am sure of that.

Q. When did you first see this—what you call a coal train on the fourth track?

A. The train I was on?

Q. No, the D. & H.

A. Why I see that every day—I used to pass there, I seen that every day.

Q. Do you mean to say that that train was standing there for several days?

A. Yes, sir.

Q. And didn't move?

A. No, sir, blocked the crossing; used to stand there at the crossing, and people couldn't see.

Q. Then there was no engine attached to it?

A. No, sir, no engine, not as I seen.

Q. Would you have seen it if there was—you would, wouldn't you?

A. No, sir.

Q. You say it was a Jersey Central train coming down on the D & H. track nearest to you?

A. Yes, sir.

MR. TORREY:

> The jury may as well understand, as the court and the other counsel do undoubtedly, that both the D. & H. and the Jersey Central Road used that same track; that is, the Jersey Central has traffic rights over the D. & H. tracks; so that there may be no confusion about that, and that this Lehigh Valley track is simply a switch track running up to the Heidleberg No. 2..

Q. The Jersey Central freight train was running south?

A. Right toward Wilkes-Barre.

Q. Did that get over the crossing before your caboose got over the crossing?

A. Yes, sir, it was gone by at that time; she was waiting for our coal train to pass over.

Q. You mean it was standing still?

A. No, sir, the freight train was gone by.

Q. How far?

A. Well gone by about 300 feet say; I didn't measure it, but went that anyhow.

Q. Did you see the accident?

A. Well I seen the accident, yes, sir.

Q. Where did you say you first saw the passenger train?

A. I saw the passenger train about 300 feet away from the crossing.

Q. That was the first you noticed of it at all?

A. Yes, the passenger train and freight train passed both at the same time; and there was quite a cloud of smoke from the freight.

Q. You saw nothing of it before that at all?

A. No, sir, on account of the freight train, had it blocked out towards me.

Q. You were not watching it then?

A. Yes, sir, I was looking towards Wilkes-Barre—I was on the hind end looking towards Wilkes-Barre.

Q. What did you do after the accident; did your train stop or did you go on?

A. I jumped off and picked the young fellow up and found he was dead—he moved his arm over, after I took a hold of him.

Q. How long did you stay about there?

A. About five or ten minutes, and got on the train and rode off.

Q. On what train?

A. On the Lehigh Valley switch train.

Q. That train stopped, then?

A. Yes, stopped afterwards.

Q. And the engineer and the rest of the crew came back there?

A. Yes sir, came back to examine it.

Q. Did you ever take the trouble to count for for an hour or two, or for any period, the number of wagons and teams that crossed that crossing?

A. Oh no, I didn't do that—That is where our stable is, right there—the company barn is right there, and most of the time I would be working around there, hauling feed, and I could see everything that happened.

Mr. SHERWOOD. I ask that the witness be allowed to answer his question.

The COURT. I don't see but he has answered the question fully.

MR. TORREY.

Q. Would you be surprised to know that by actual count it is very seldom that 50 teams a day cross that crossing?

MR. SHERWOOD. We object to that as immaterial.

THE COURT. I think your question is objectionable.

MR. TORREY.

Q. You never made any count yourself, did you?

MR. SHERWOOD. I object to it as repetition.

MR. TORREY. Q. Did you ever make any count of the number of foot passengers that go across there?

Mr. SHERWOOD. I object to that as immaterial.

BY THE COURT. Let him answer that.

A. Why no sir, I never done anything of the kind,—what would I be doing that for?

Q. You say there are trains there every minute of the day?

A. Yes, sir, every five or ten minutes anyhow.

Q. Did you ever make any count of the trains?

A. No, sir.

Q. You say now—every five or ten minutes, do you?

A. Yes, sir, they run regular freight trains, coal trains and passenger trains—all trains—running all day.

GILBERT JACOBOSKY, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mr. Jacobosky, what is your business?

A. Civil Engineer.

Q. Where do you live?

A. Wilkes-Barre.

Q. Whether or not at my request you went upon the ground at Snaith's Crossing, or the place where this accident occurred, and took measurements, and made this map from your measurements?

A. Yes sir.

Q. Does this map accurately and correctly show the location of the tracks at the crossing, and elsewhere, as they were at the time you took your measurements?

A. Yes, sir.

Q. What was the date you made the measurements?

A. February 11th, 1908.

CROSS EXAMINATION.

MR. TORREY.

Q. Mr. Jacobosky, who told you to put that title on that map?

A. Why I made up the title myself, and submitted it to Mr. Sherwood.

Q. Yes. You don't know whether those tracks are represented now as they were on July 30th, 1907, do you?

A. No, sir.

Q. You show here a shanty—is that shanty there, or was it, when you made your survey?

A. That shanty was there when I made my survey.

Q. You show another one, in red, was that there when you made your survey?

A. Yes, sir, that was there last Saturday.

Q. When do you say you made your survey?

A. The survey was made on the 11th of February, and the map on the 14th of February.

Q. And the Lehigh Valley tracks were laid by measurement, were they?

A. Yes sir.

Q. You have some marks here in red, on the bridge, and on the Lehigh Valley tracks, just before you reach the D. & H. tracks?

A. Yes sir.

Q. Where did you get the data from which you made those marks?

A. I took that data on the ground.

Q. Took what data?

A. The distances there.

Q. Who gave you the distances, to measure? Did Mr. Sherwood give them to you?

A. No, sir, I made that myself.

Q. What do they represent?

A. They represent the points that I took it there, for plotting purposes, and this map is made to scale here, and the distance can be scaled off, all the way along there.

Q. What do A. B. C. D. & E. represent?

A. The instrument points—we took prints here to locate the wagon road—and they are reproduced by us to show this profile.

Q. I see, they correspond with the profile map?

A. Yes sir.

MR. TORREY. I object to the admission of the map, because the title of the map which is very conspicuous, constitutes practically an argument; and, second, that according to the plaintiff's own testimony, the tracks have been changed since the accident; so that they are not now as they were.

MR. TORREY. I withdraw the second objection.

THE COURT. I will cut out the title part.

MR. SHERWOOD.

Q Mr. Jacobosky, that title which is on there, wasn't made at anyone's suggestion?

A. No, sir.

Q. And that map was delivered to me for the first time this morning?

A. Yes sir.

Q. What is the character of the highway on this map, as shown on this map, as you approach this crossing?

A. Why, it is up-grade.

Q. And is it level, or a dug-road? In here (indicating) In between the Lehigh Valley cut-off

road and the Delaware and Hudson; do you recall as to that?

A. No, not particularly.

Q. What does this on the upper left hand corner show?

A. That is a profile of the road from this intersection of the roads here, over past the crossing.

Q. That is a profile then from the main road that runs to Avoca, between Dupont and Avoca, over to the crossing?

A. Yes sir.

Q. Showing the grades?

A. Showing the grades.

Q. And this lower down here is what?

A. The Lehigh Valley track.

Q. That is that point on the map to which I am now pointing—and this point over here is what?

A. The D. & H. track.

Q. And this is the point at which the accident is said to have occurred?

A. Yes sir.

Q. And the intervening line between shows the grade of the highway, does it not?

A. Yes sir.

Q. There are four houses on the opposite side from which Mrs. Flannelly is said to have approached, made upon your map; were there other houses—a row, extending down along there?

A. Yes, there are houses all the way down along there.

Q. This does not show the village?

A. No, sir.

Q. Where is the village with reference to the crossing?

A. Right up around in here (indicating on map).

Q. And extending down to the viaduct?

A. Yes.

MR. SHERWOOD.

(Addressed jury) The village is right around, and extends down here, as you will see when you go down tomorrow.

Q This viaduct is how far from the crossing in question?

A. 1950 feet.

Q. And the whistle board for trains coming towards the crossing from down in the direction of Pittston is how far from the crossing?

A. 1420 feet.

Q. And the whistle board for trains going the other way is how far from the crossing?

A. It is 1,000 feet down.

Q. What they call the viaduct is the over-head bridge of the Trolley road, is it not?

A. Yes sir.

Q. Now right there in that locality, we have how many tracks on this road?

A. Three tracks of the D. & H.

Q. Immediately by its side, and close to it, right in a cluster, is the track of what road?

MR. TORREY.

I object to the question; the map shows.

THE COURT:

Yes.

MR. SHERWOOD.

Q. What other railroad is a little farther away, in the same locality?

A. There is a track that belongs to some other road—a double gauged.

Q. And what other roads are there in that immediate vicinity—this map doesn't take in?

A. The Lehigh Valley Railroad, as shown, had one road.

Q. Where is that trolley line, in reference to it, is it far from it?

A. No, sir, not a great distance.

Q. Where is the Cannon Ball?

A. The Cannon Ball would be along here.

Q. And the trolley line along here?

A. Yes sir.

Q. And the Lehigh Valley here?

A. Yes sir.

Q. Your map shows particularly the D. & H. road, and the one Lehigh Valley track along by it?

A. Yes sir.

MR. TORREY.

Q. Of course you don't know whether these whistle boards were at the same points at the time of the accident, that they were, at the time you made your survey?

A. No, sir.

Q. You just took things as you found them?

A. As I found them.

Q. If it is true that that which was the north bound track in July, is now the south bound track and vice versa, the whistle boards probably would not be in the same place?

MR. SHERWOOD

I object to the question as argumentative.

THE COURT.

You can hardly assume that.

C. HENRY GILFEATHER, sworn for plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mr. Gilfeather, what is your business?

A. Plumber.

Q. Where do you live?

A. Wyoming.

Q. Down below Pittston?

A. Yes, sir.

Q. How old a man are you?

A. Eighteen.

Q. Where were you working at the time of this accident?

A. At John Hexter's residence in Dupont.

Q. What part of the house were you working on at the time?

A. On the roof.

Q. Were you above, as regards altitude, were you higher up than this crossing?

A. Yes sir.

Q. Did you see the accident?

A. Yes sir.

Q. Tell us what you saw?

A. I was sitting on the roof, looking down towards the crossing; there was a freight train slowly coming down the track.

Q. Which track was that on?

A. The track nearest to me, the first track.

Q. That would be the first track Mrs. Flannelly would come to?

A. Yes, sir.

Q. When you say the freight train—do you know whether it was a freight or a coal train?

A. I am not positive whether it was a freight or a coal train.

Q. Just one moment now—stop here. Step down here. Here is the Hexter's house on the map (witness steps down in front of jury box, and counsel explains map) This is Hexter's house, is it not?

A. Yes, sir.

Q. And you were on the roof of that house?

A. Yes, sir.

Q. And you saw a freight train pulling down on the track next to you?

A. Yes, sir.

Q. That is this track (indicating)?

A. Yes, sir.

(Witness back on the witness stand)

Q. Now, you saw "coming down," you mean towards Pittston?

A. Yes, sir.

Q. Did you see Mrs. Flannelly, or her rig at that time?

A. I saw Mrs. Flannelly drive up there and stop and wait for this train to go past.

Q. Where did you next see her, if you saw her stop, before she went upon the track?

A. The next I saw of her, I saw her start for the crossing, I then started on my work, and didn't see her afterwards until I heard the whistle start to blow.

Q. Where was her horse at that time?

A. To the best of my judgment the horse was on the second track from me.

Q. And that would be the middle of the three tracks, would it not?

A. Yes, sir.

Q. Did you see the passenger train?

A. I saw the passenger train at the time I heard the whistle blow.

Q. About where did you first see the passenger train?

A. About 800 feet down the track.

Q. What, if anything, did you see Mrs. Flannelly do to her horse?

A. I saw Mrs. Flannelly hit the horse, as I heard the whistle start to blow.

Q. Did you notice her hit the horse more than once?

A. No, sir.

Q. How far across did she get, or, what part of the rig was struck?

A. The left hind wheel of the wagon.

Q. How was that train coming?

A. Coming very fast.

Q. Will you give us some close idea—

MR. TORREY.

Do you want him to give the number of miles per hour.

MR. SHERWOOD.

I want him to give what I have asked.

A. The best of my judgment the train was running about——

MR. TORREY.

I object to your giving the number of miles per hour. I don't think the witness can give an opinion.

MR. SHERWOOD.

Q. Have you seen trains running more or less all your life?

A. Yes sir.

Q. Have you observed the rate of speed at which trains run at different times?

A. I did, yesterday, yes sir.

Q. Well, from 800 feet below the crossing, about how long did it take that train to reach that crossing?

A. To the best of my judgment between seven and eight seconds.

Q. This whistle which you spoke of, what kind of a whistle was it?

A. One long blow.

Q. Did that alarm you?

A. Yes sir.

Q. Did you realize it was a danger whistle?

A. Yes, sir.

Q. Did the train give any regular crossing signals, aside from that whistle?

MR. TORREY.

I object to this method of examining their own witness.

MR. SHERWOOD.

Q. What warning, if any, was given aside from that long whistle?

A. I heard no whistle besides that one, which I suppose was the danger whistle.

Q. Did you hear any bell rung?

A. No, sir.

Q. Did you notice the coal train that pulled, as we come up, I mean toward Avoca—down I guess would be correct—on which the Strubeck boys say they were—did you notice that train?

A. No, sir.

Q. So that the train, as I take it from your evidence, that you saw, was the only train you saw aside from the train that struck Mrs. Flannelly's wagon?

A. I saw the freight, or at least a train of high cars going down to Pittston.

Q. Where—on the track between her and the track upon which she was injured?

A. Yes, sir that is the only train I saw.

Q. As I understand you, you say from the time you saw her start up from the place at which she stopped—saw her stop, until you saw her horse upon the second track, and heard her scream, or something of that sort, you didn't see her in that intervening space?

A. No, sir, I did not.

CROSS EXAMINATION

MR. TORREY:

Q. What time of day was it?

A. Somewhere around 11 o'clock to the best of my judgment.

Q. It was a pleasant day?

A. No, sir, it was not—it was a dark, cloudy day.

Q. It wasn't a stormy day?

A. No, sir.

Q. You could see very clearly from where you were?

A. Yes sir.

Q. And that was seven or eight hundred feet away, was it, from the crossing?

A. I should judge it would be about 600 feet away, I could not say positively.

Q. What first attracted your attention?

A. I was looking over at the crossing, at the present time, and that was the first I noticed it.

MR. TORREY:

I think we can save time if you will permit me to postpone the cross examination of this witness.

MR. SHERWOOD.

I have no objection to postponing it.

(Witness excused for the present.)

GILBERT JACOBOSKY, Recalled by Defendant.

FOR FURTHER CROSS EXAMINATION.

MR. TORREY.

Q. The house pointed out to this witness, right here—can you tell us how far that is from the crossing? The house where Mr. Gilfeather says they were working?

MR. SHERWOOD.

John Hexter's house.

A. 940 feet.

ROY WALLACE, Sworn for Plaintiff.

DIRECT EXAMINATION

MR. SHERWOOD.

Q. Mr. Wallace, I understand you were also working by the side of Mr. Gilfeather on the top of this house of Mr. Hexter?

A. Yes sir.

Q. And saw this accident, or at least a part of it?

A. Very near all of it.

Q. Will you go on, as briefly as you can, in your own way, and tell the court and jury what you know regarding it?

A. The date was on the 30th of July; we were up at John Hexters working for—we had been working for the Valley Coal Co. first putting stuff on the roof, and John Hexter had a little to do, and we were on the roof, on the upper-hand side.

Q. With reference to that crossing, whether that raised you above the crossing—higher?

A. Yes sir, considerably higher.

Q. What did you see?

A. We were there working, and we happened to be looking around, and mentioning the different number of trains passing there, and just as I went to turn around, I heard the passenger whistle, and seen the lady waiting for the other train to pass; and there was a whistle blowed—one long whistle, and I said to the boy "Look out, something is going to happen" and at that moment the passenger train struck the back end of the wagon, and the boy and I ran down and seen what happened.

Q. Now, you first saw the lady waiting, as I understand you?

A. Yes sir.

Q. That was before she went upon any tracks at all?

A. Yes sir.

Q Do you remember seeing a freight train going down Pittston way?

A. Yes, there was a train going down.

Q. On which track was that train?

A. I don't know—I would not say for sure about that, until the other day I was up to the other attorney's office here, and they had a picture of it there.

Q. What office do you mean?

A. Up to the lawyer's office, the other lawyers office—they have a picture up there, and have the freight train on the opposite track, the other track from the passenger.

Q. Which track, to the best of your judgment, was the train on?

A. After I seen that picture of it, I think it was on the first track.

Q. And they have it on what track?

A. On the third track.

Q. But as you recollect it, you think it was on the first track that Mrs. Flannelly came to?

A. Yes, sir.

Q. You saw her first there?

A. Yes sir.

Q. Then where did you next see Mrs. Flannelly?

A. It was after the passenger train hit the wagon, I seen her lying on the ground kinder getting up, as we were going down off the ladder.

Q. Do you remember seeing her hitting the horse with the whip?

A. I seen her make a quick move, as if she was,—I couldn't say whether she hit the horse or not.

Q. How far from the crossing was this passenger train when you first saw Mrs. Flannelly's horse on the second track?

A. When I first seen the passenger train, the train was somewheres around the whistle post.

Q. When you say "Whistle post" you mean—you know where the whistle posts are now, do you not?

A. Yes sir I have passed there a few times since.

Q. With reference to which whistle post do you refer?

A. The one for the up-trains.

Q. And that would be the whistle post nearest the viaduct?

A. Yes sir.

. And at that time, where was Mrs. Flannelly's horse?

A. On the second track.

Q. What signals, if any, were given by the coming passenger train?

A. All I heard was one whistle.

Q. Did that whistle attract your attention as being an alarm whistle?

MR. TORREY.

I object to this line of questions, your honor.

(Question withdrawn)

MR. SHERWOOD.

Q. Describe the character of the whistle?

A. The whistle gave one long blow.

Q. How was the train coming?

A. The train was coming very rapidly.

Q. Have you made any tests by which you could give us about the length of time that elapsed from the time you first saw that train, as you say, and her horse was down on the second track, and the train was at the whistle post nearest the viaduct, as it is now located; have you made any tests by which you can give us some accurate tests——

A. Yes sir about 8 seconds.

MR. TORREY.

I object to the question, and to the answer and move that the answer be stricken out.

THE COURT.

Strike it out.

MR. SHERWOOD:

Q. What tests have your made?

A. The D. & H. trains, by timing them for a certain distance, and also the D. L. & W.

Q Have you ridden over this same stretch?

A. Yes, sir,

Q And timed any trains?

A. Yes sir.

Q. What length of time did it take that train to cover the distance from that whistle post to the crossing?

MR. TORREY.

This is a mere guess, your honor.

A. I don't guess at it, I timed it. I have traveled on the same train.

THE COURT.

Q. Do you mean you have traveled on the same train, over the same space?

A. No, I didn't get off right there at the crossing, but I have got off at the Avoca station.

Q. You traveled over the same space from where you saw the passenger train to where the accident occurred?

A. Yes, sir, from where I first seen the train to where the accident occurred, and timed it for that distance.

MR. TORREY.

Q. Are you giving the regular running time, now?

A. This is the rate it was going the day I timed it—I don't suppose it was running any faster.

THE COURT.

I think we had better not take that evipence. Note an exception for the plaintiff.

Q. Where was Mrs. Flannelly when you heard the whistle?

A. She was on the second track

Q. She had already started to cross, and got on to the second track?

A. Yes, sir, the horse was on the second track.

CROSS EXAMINATION.

MR. TORREY:

I would also postpone his cross examination, with your permission.

ALICE AHERNS, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mrs. Aherns, where do you live?

A. In Dupont

Q. You are a married lady, having a permanent home, are you?

A. Yes, sir.

Q. Near this crossing. Your home, I take it, is not upon this map—not laid out on the map. Here is the crossing, and here is the Lehigh Valley tracks in the hollow, now with reference to that crossing, where is your place?

A. My house must be over here (indicating)

Q. About opposite the crossing, the Lehigh Valley, across from the crossing, where the accident occurred. Your home, I take it, is about on a level with the D. & H. tracks?

A. I should think so—the Lehigh Valley tracks are in a hollow kinder.

Q. And between your home and this D. & H. track?

A. Yes.

Q. Where were you when this accident occurred?

A. I was sitting on the porch.

Q. On the porch of your home?

A. Yes sir.

Q. And that porch looked out to this crossing?

A. Right over the D. & H. crossing—over towards the crossing.

Q. What is the name of that crossing?

A. Snaiths crossing, I always heard it called since I lived there.

Q. Named after the man that owned the corner house then—there wasn't any other house there then. You saw the accident, did you, or part of it at least?

A. I saw some of it, yes; I saw Mrs. Flannelly when she was coming up the hill, and saw her stop, but I was reading, and I went on reading, I didn't think anything more of it, and the next thing I saw,—well, I heard the passenger train whistle very sharp, and looked up to see, and Mrs. Flannelly, I don't know whether she was jumping out or what they was doing, but anyway the train had just hit the back of the wagon.

Q. Now with reference to hitting her, and the whistle—where was the passenger train when it blew the whistle?

A. Well I could not say exactly—it wasn't very far away from Mrs. Flannelly.

Q. What kind of a whistle was it?

A. Very sharp whistle.

Q. Was it a danger whistle?

A. Yes, sir.

Q. It wasn't the ordinary crossing whistle?

A. No, sir.

MR. TORREY.

That I object to, and have objected to

right along—putting conclusions in the witnesses mouths, I move to have the answer stricken out, your honor.

THE COURT:

It is not best to ask those questions in that way. I will strike out the answer—the last two answers.

MR. SHERWOOD.

Q What kind of a whistle or signal was that, that was blown; how did they blow it?

A. Very sharp,—long and sharp.

Q. When you say "long", what do you mean?

A. I mean that it blew quick, and sharp—faster than it usually did.

Q. I would liike to have you describe it as best you can?

A. That is as near as I can.

Q. Do you knew what a danger whistle is?

A. Yes, sir.

Q. Just tell us how it blows, if you know?

A. Well, as near as I can tell you, very sharp, and quick.

Q. And continuous?

A. Yes.

Q. Now with reference to the other trains what did you observe?

A. Well there is a side track there, and there was a train on—I could not say how many cars, standing on that side track—they were coal cars—I think they were coal cars; they were not freight cars.

Q. Were they high cars?

A. They were quite high—high coal cars.

Q. And that was on the side track?

A. Yes sir.

Q. When you say the side track, that is the first track?

A. That is the first track—it was used for a side track always.

Q. Can you give us about some practical idea about where the hind end of that train was at the moment that you saw Mrs. Flannelly struck—I mean this train that you say was standing?

A. Well it stood about to that second red house?

Q. Now I show you the map—I would like to have you point to it—Here is the crossing.

A. About to this point (indicating).

Q. How did you point that out to me the other day—by what on the ground?

A. There is some new dirt filled in there, filled in since the accident. There has been some new dirt put along there, and about where the new dirt is, is where the coal train was standing.

Q. Which end of the new dirt?

A. This end.

Q. The end nearest the crossing?

A. Yes sir.

Q. And that is at a point on the railroad about even with the end of the second double house nearest the crossing—we looked it over yesterday, did we not?

A. Yes sir.

Q. Or Saturday, I should say? Of course, as I understand you, you didn't take definite note of any of these things?

A. No, sir I didn't. I wasn't over there.

Q. Did you go across there to the point of the accident?

A. No, sir.

Q. Were there any signals given by this passenger train, aside from the one whistle?

MR. TORREY.

I object to the question.

A. I didn't hear any.

MR. SHERWOOD.

Q. Have you good hearing?

A. Yes sir.

Q. Is there any trouble, sitting on your porch there, ordinarily to hear signals if they are given down at the points of the signal posts?

A. I think not, no, sir.

Q. Would you not be removed from the noise of the passenger train and could you not hear it more readily at that point than some one who was at the crossing, and the train passing?

MR. TORREY.

I object to the question.

THE COURT.

The objection is sustained.

MR. SHERWOOD.

Q. The point you were, was removed from the noise?

A. Yes sir.

Q. Did you see Mrs. Flannelly after the accident?

A. Yes sir.

Q. Where?

A. I saw Mrs. Flannelly when they brought her over to Mrs. Fleitz'—she lives next door to me.

Q. Were you in there?

A. I went over there a few minutes, yes, sir.

Q. Then you saw something of her condition at that time?

A. Yes sir.

Q. Can you give us some idea what her condition was there, how she acted?

A. Yes, I think she acted like somebody that was out of their mind; that didn't know what they were doing at all; that is what I think about Mrs. Flannelly; I don't think Mrs. Flannelly realized at all what she was doing or saying.

Q. How was she acting?

A. Well, screaming, and, that little boy of hers; she was lying on a couch, and that little boy was sitting on the foot of the couch, and she looked down and saw him, and she seemed to be—kinder realize that he was there with her, and she jumped up, and threw her arms around that little boy and kissed him, and didn't hardly realize what she was doing yet—she kinder realized that little boy was safe. Now that is what I thought; she felt so glad to think that he wasn't killed. That is what it put me in mind of, and then I went home, over to my own house, because I had left my children there alone.

Q. Did you know Mrs. Flannelly prior to her injuries?

A. I saw her three or four times before that.

Q. Did you have a close acquaintance with her?

A. No, sir.

Q. Were you closely enough acquainted with her to give us a fair statement of evidence so that you think you could say fairly whether she was apparently a healthy woman?

A. She seemed like a healthy woman. I saw

her to my mother-in-laws, a couple of times—She was there getting a carpet woven.

Q. This train which you say was on the first track there, do you know when that came in there —whether it just came in?

A. No sir I could not tell you whether it was standing there, or whether it just pulled in—it was on the side track, and very often they stop there for three or four weeks.

CROSS EXAMINATION.

MR. TORREY:

Q. What was your maiden name?

A. Alice Siglin.

Q. How long have you lived in this place?

A. I have lived in that house 20 years the 12th of last June.

Q. Which direction does your house face; towards this crossing, or away from it?

A. Yes, the front of the house is towards the crossing. It is on a middle street, it isn't on the main street, in Dupont.

Q. And about what time of day would you say it was?

A. Well, it was somewheres near noon—I would not say what time it was.

Q. Do you know where Mr. Hexter's house is?

A. Yes sir I know where Mr. Hexter's is.

Q. Would you say that your house is nearer or farther away from the railroad than his?

A. My house is nearer to the Red Row than his.

Q. Nearer to the crossing than his?

A I think it is, yes sir.

Q. You were just sitting on the porch?

A. Just sitting on the porch, reading.

Q. You could see pretty squarely across?

A. Yes, you can see.

Q. And it was a clear day?

A. Well I just don't remember whether it was a clear day or whether it was cloudy.

Q. At any rate you had no trouble seeing it?

A. No.

Q. You say the first thing you noticed was Mrs. Flannelly as she stopped, before she went across?

A. Yes sir.

Q. She was how far from the tracks?

A. She was, I think, at the usual stopping place, where they stop to wait for the trains.

Q. There is a little level place, or space there, just before you reach the tracks?

A. Yes sir just a little place there where they all stop.

Q. It is possible that the passenger train might have made the whistle for the crossing, without your hearing it, or noticing it, might it not?

A. Yes, sir, it might possibly; I would't say whether it did or not.

Q. You didn't pay attention to all the whistles that usually come along there?

A. Oh my, no.

Q. This danger whistle you heard was one that would attract your attention?

A. Yes sir.

Q. Because it was unusual?

A. Yes—well, it isn't unusual, because very often you hear those danger whistles along there; there has been a—it is considered a dangerous cross-

ing, and there wasn't anything there to warn people besides the whistle from the train.

MR. TORREY:

Now, I ask to have all that stricken out, your honor, as not at all responsive.

MR. SHERWOOD.

I object to its being stricken out.

THE COURT.

Let it go out. Note an exception for the plaintiff.

MR. TORREY.

Q. Please confine yourself to answering my questions, and I think we will get along better. As you looked over there, after hearing that danger signal what did you see with reference to Mrs. Flannelly?

A. Well, I saw the passenger train, and the next I saw of Mrs. Flannelly I saw the passenger train striking the back of her wagon.

Q. And you saw her jump out?

A. No, I didn't see her jump out.

Q. You didn't see her jump out?

A. No, sir.

Q. You didn't see the boys either?

A. No, sir, I didn't.

Q. What became of the boys?

A. I don't know—it was very exciting.

Q. You didn't go over there?

A. No, oh no.

Q. Did you see the freight train coming down over the crossing towards Pittston?

A. Well, I didn't take notice of it.

Q. You didn't notice it at all?

A. No, sir.

Q. You didn't notice the Lehigh Valley train either?

Q. No, sir, I didn't notice the Lehigh Valley train.

Q. Then the only train that you really saw was the passenger train?

A. The passenger train and the train on the side track.

Q. Was there a locomotive attached to that?

A. I could not tell you.

Q. You don't know whether there was or not?

A. No, sir.

Q. You could not be sure that it was not moving?

A. I don't think it was moving.

Q. You would not be sure about that?

A. No, sir, I would not be sure that it wasn't moving.

WILLIAM WHITES, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mr. Whites, where do you live?

A. Hughes town, Centre Street,

Q. What is your business?

A. Sewing machine agent.

Q. Where is your place of business?

A. 78 North Main Street Pittston.

Q. Where were you at the time of this accident?

A. Red Row collecting.

Q. With reference to the crossing where the accident occurred, which house in Red Row?

A. I was about the 5th house.

Q. Toward Pittston or the crossing?

A. Towards Pittston from the crossing.

Q. In the highway?

A. Public highway.

Q. What were you doing?

A. Collecting.

Q. Did you see the accident?

A. Yes sir,—seen the accident.

Q. What did you see?

A. I was outside the house, and there was one train going north—

Q. When you say going north, you are going in which direction?

A. To Scranton.

Q. Which track?

A. Lehigh Valley.

Q. With reference to where you were?

A. It was the first track. And then there was one train going south.

Q. Which track?

A. The Delaware & Hudson, the second track. Then there was some on the 4th track from me.

Q. Can you tell how long a train was on the 4th track?

A. No, sir, I could not say.

Q. What track was the train on that struck this woman's wagon?

A. In the third track, from me, in the centre.

Q. Now which track—each side of that train, as it approached there, what was there, if anything?

A. There was on each side of the centre track, there were two freight or coal trains.

Q Tell us about the accident?

A. And I seen when the train, the D. & H. freight train which was a very long train cleared the crossing, and the Lehigh Valley cleared the crossing,

and they was quite a little distance from the crossing, and just at that moment there was a passenger train come down on the centre track, and there was a party crossing the crossing, but I didn't know who it was, and the passenger train come right on down on 'em, and when I reached the crossing I found out who it was, and that it was Mrs. Flannelly.

Q. Where was her horse, where upon the crossing, as near as you can tell was her rig when you first saw it?

A. It was on the third crossing from the side I was, but from the side-she was, it was it was the second crossing.

Q. What signals, if any, were given by the train that struck this wagon?

A. I didn't hear of any signals.

Q. Have you good hearing?

A. Good hearing, yes, sir.

Q. Were you approaching that crossing?

A. No, sir, I was over the crossing.

Q. You had come the other way?

A. I had come the other way

Q. You were neared to the whistle post by some feet than Mrs. Flannelly?

A. Yes, sir.

Q. And you were away from the line of the passing noise to some extent?

A. Yes sir.

Q. How long have you known this crossing?

A. I have known that crossing between eight and nine years.

Q. Did you notice the danger whistle?

A. No, sir I didn't take notice to the danger whistle.

Q. What was Mrs. Flannelly's condition, after the accident there at that time?

A. Why she was very excited and very weak.

Q. Where was she after the accident?

A. Why she was standing around, and dancing, and then she sat down or laid down I could not say which.

Q. Got up and kinder danced, you say?

A. Yes, she was very excited; like a person would not have their mind right, altogether.

Q. Had the rig got over the crossing?

A. No, sir.

Q. Well it got, with reference to the track upon which it was struck, which side was the rig finally found on?

A. On the right hand side of the track.

Q. Was that the side from which they approached, or the other side?

Q. On the other side.

Q. On which side do you mean?

A. That side (indicating).

Q. On the side nearest you?

A. No, the other side from me.

Q. Did you see the horse afterwards?

A. Yes sir, I seen the horse, it was tied to the pole—there was a gentleman took and tied him to a post, and he was very nervous.

Q. What side of the track was that on?

A. That was on the right hand side of the track, the side I was on.

Q Where was the wagon, after the accident?

A. The wagon laid in the ditch—laying in the ditch, 4th track and the ditch, and the hind part was smashed up into kindling wood, and part of the wagon laid on the track and part in the ditch.

Q. When you say in the ditch, what do you mean?

A. That is right where the railroad goes like that (indicating) there is a little embankment up, a little filling.

Q. On the side towards you?

A. Side toward me.

Q. So that the horse and the wagon was left finally on the side of the passenger track, nearest you?

A. Yes.

Q. Where was Mrs. Flannelly after the accident —was she on the side towards you or opposite?

A. On the side toward me.

Q. Where was the dead boy?

A. The dead boy was in the third track, in the centre —well, most in the centre, laying to the right hand side of the rail, going down there.

Q. When you say the third track—that means, including the Lehigh Valley, first, and the second, Delaware & Hudson three tracks; now do you recollect where the little Flannelly boy was found?

A. Yes.

Q. Where?

A. The little Flannelly boy, he was on that side of the crossing.

Q. Which do you mean?

A. The side toward me.

CROSS EXAMINATION.

MR. TORREY.

Q. Did you see these people before they were struck at all?

A. No, sir, I didn't see them before.

Q You didn't see them just when they were struck, did you?

A. I seen them, when they were struck.

Q. The engine was between you and the hind end of the wagon, wasn't it?

A. No, sir.

Q. The hind end of the wagon hadn't yet got on to the crossing, had it?

A. The hind end of the wagon, the rig, was right over the second track.

Q. Did you see Mrs. Flannelly and her boy jump out?

A No, sir, I could not say how they got out.

Q. You could not say how they got out?

A. No, sir.

Q. You could not see them from where you were?

A. Yes, I could see it—I seen the spill, and that is all—it was done just like a flash of lightning.

Q. About how far did the passenger train run after the accident?

A. In my estimation, from where it laid, it would be between 60 and 100 yards from the crossing; but I didn't take a regular measure and measure it.

Q. Who lives in the house where you were?

A. A Polish family but I could not tell you their names.

Q. Were you collecting from them?

A. Yes, sir, I had been collecting of them.

Q. You were collecting a bill from them?

A. Yes, sir, I had finished there and came outside and stood.

Q. And you cannot tell their name?

A. Well, I cannot tell the name—I could tell the name if I had the book.

THE COURT.

Q. How far beyond the crossing did you say the passenger train ran before it stopped?

A. From the rear, was 60 to 100 yards.

MR. TORREY.

That would be somewhere in the neighhood of the length of the train?

MR. SHERWOOD.

I object to that.

A. I never measured the passenger train.

MR. TORREY.

Q. You say that there was a train going northerly on the Lehigh Valley?

A. Yes sir.

Q. How many cars in it?

A. I could not tell you how many cars it had—I never counted them.

Q. How was that with reference to the crossing when the accident occurred? Was it just over the crossing?

A. The Lehigh Valley freight or coal train rather, it was quite a little distance from the crossing?

Q. When the accident occurred?

A. Yes, and so the other train was a little distance.

Q. It had gone over?

A. It was over the crossing.

Q. And the Jersey Central train?

A. I could not tell you whether it was a Jersey Central or Delaware & Hudson; but it was on the D. & H. track?

Q. There was a train on the first D. & H. track?

A. Yes sir.

Q. The end hadn't got down as far as you were?

A. The end hadn't got down quite as far as I was—there was only a little distance, and I could see the accident very plain from the point where I was.

Q. You were standing up where you could look over the cars?

A. I seen everything.

Q. What called your attention to any cars on the 4th track?

Q. There was—I don't whether they were just moved in or been in, but there has been trains of cars on the 4th track.

Q. Was there an engine attached to them or not?

A I could not say whether there was an engine attached to it or not—I didn't exanine it.

Q. And you couldn't tell whether it was standing still or moving on the 4th track?

A. Not at that moment, I hadn't taken exact notice of it.

Q. You didn't pay any attention to it anyway?

A. I noticed them standing there, but I didn't take interest into it; they could have been moving or not, I could not say.

Q. How did you go to this house; did you go across this same crossing when you came to it?

A. I came over that crossing.

Q When you went up to that house?

A. I went over that crossing—went collecting in the first red house, and then I collected to the second house, and then I went to the 4th house.

Q There were no cars standing on the 4th track at the time you went over, first?

A. Yes, sir, there was.

Q. You are very positive about that?

A. Sure.

Q. How far were they below the crossing?

A. I could not say how far—they were above the crossing. They were beyond the shanty that was there, and they have since moved that shanty—they have made a different change.

Now 5 p. m. adjourned to 9:30 tomorrow morning.

Now 9-30 March 24, 1908, court reconvened.

C. H. GILFEATHER, Recalled for Cross Examination.

MR. TORREY.

Q. Mr. Gilfeather, you said you were a plumber?

A. Yes sir.

Q. What is your age?

A. Eighteen.

Q. Were you a helper, or did you have charge of the job?

A. I was a helper.

Q. Who had charge of the job?

A. Roy H. Wallace,

Q. What work were you doing in this house?

A. Soldering, at the present time.

Q. That is, at that time?

A. Yes sir.

Q. Soldering what?

A. Soldering a tube in the gutter.

Q. That was on the corner of the house nearest to the railroad, wasn't it?

A. Yes sir.

Q. And you had a ladder up there?

A. Yes sir.

Q. Were you on the roof or on the ladder?

A. On the ladder.

Q. Both of you?

A. Yes sir.

Q. How high up on the ladder?

A. I was at the top of the ladder.

Q. And Wallace was below you?

A. Yes sir.

Q. Were you soldering toward the top of the gutter or toward the bottom?

A. I was soldering in the gutter, anyway.

Q. In the gutter, under the eaves?

A. Yes sir.

Q Now, naturally in doing your work, you would be facing away from the railroad, wouldn't you?

A. Yes sir.

Q. How far below you was Wallace?

A. He was right up close to me

Q. What was the first that you noticed of anything with reference to this train?

A. I was waiting for my iron to get hot, and I was turned around looking towards the railroad.

Q. What was the first you noticed of train?

A. The trains go up and and down there so fast, was the first I noticed.

Q Which one did you notice first—which train did you notice first?

A. The freight train.

Q. And that was going south?

A. Yes sir.

Q. And that was on the 3rd track from you, was not?

A. No, sir.

Q. Do you mean to say that you could be sure what track that was on?

A. Yes sir.

Q. From that distance?

A. Yes, sir.

Q. And you noticed very particularly?

A. Yes sir.

Q. And you now say that it was going on the nearest track to you?

A. Yes sir.

Q. It was moving down, was it?

A. Yes, sir.

THE COURT.

That is towards Pittston?

A. Yes, sir.

MR. TORREY.

Q. Towards Pittston, was it?

A. Yes, sir.

Q. How many cars were there in the train, would you say?

A. I couldn't say.

Q. Can you give us some idea?

A No, sir.

Q. What place, with reference to the crossing was it when you first noticed it—was it north or south of the crossing?

A. It was going over the crossing when I first noticed it.

Q. Was there a locomotive at the head of the train?

A. Yes, sir.

Q. And a caboose on the rear of the train?

A. I didn't notice.

Q. And while that train was going over the

crossing the woman was standing by the crossing waiting, was she?

A. Yes, sir.

Q. With her team—the train didn't stop, did it?

A. I couldn't say whether the train stopped or not.

Q. You didn't see it stop, did you?

A. No, sir.

Q. It wasn't there when you went along there?

A. Yes, sir, it was there when I went over there.

Q. You swear to that positively, do you?

A. The train was stopped below the crossing when I got over there, yes, sir.

Q. What other trains did you notice, if any?

A. Nothing but the passenger train.

Q. Nothing else but the passenger train—that is all you noticed?

A. Yes, sir.

Q. Did you see any train on the Lehigh Valley?

A. No, sir.

Q. And you didn't see any train on the 3rd track?

A. No, sir.

Q. Now with reference to the time when this train cleared the crossing, how soon did this plaintiff start up her horse?

A. She started up the grade there for to go over the crossing, and that was the last I saw of it.

Q. She started up right away, didn't she, as soon as the train cleared the crossing?

A. She started up that grade ferninced the crossing. She wasn't on the track, she was back a

distance I should judge about 15 or 20 feet back of the crossing.

Q. And as soon as the cars cleared the crossing, she started right up?

A. No, sir, not as soon.

Q. You say "not as soon?"

A. No, sir.

Q. You were sworn as a witness at the coroner's inquest that was held upon the death of the Toohill boy, were you not?

A. Yes sir.

Q. Where was that held?

A. West Pittston, at the Town Hall.

Q. It was about three weeks after the accident, or something like that; do you remember the date?

A. No, sir, I don't remember the date—I know it was a short time after the accident—I should judge about a month afterwards.

Q. You were examined there by the coroner?

A. Yes, sir.

Q. Whether in that examination you were asked this question by the coroner, and answerd in this manner:— "Q. Do you know?" A. I could not say positively, but I am pretty sure, I think the wagon stopped a bit there waiting for the freight train to go by, and as soon as the freight train got over, this woman started to drive her horse, and she gave a holler, and the boy and her jumped" Did you say that?

A. I don't recollect saying that, no sir.

Q. You don't recollect it?

A. No, sir.

Q. Did she and the boy jump out of the wagon?

A. Yes, sir.

Q. Then they were not hit by the train?

A. I could not say.

Q. You didn't see them hit by the train?

A. No, sir.

Q. Which side of the wagon did they jump out of?

A. The side towards me.

Q. That is, the rear end of the wagon?

A. Yes sir.

Q. And they jumped away from the train?

A. Naturally.

Q. Were you asked, in the same examination, this question, and did you answer as follows: "Q. Until the freight had passed, they were not on any tracks at all"? Answer "No, not as I know of; as soon as the freight passed they drove over" Did you answer in that way?

A. No, sir.

Q. And again, upon the same point, were you asked this question, and did you so answer: Q. As the freight train cleared, they started ahead?" Answer "Yes sir"—did you so answer?

A. I answered that question as a short time, as the train passed over.

Q. I asked you whether you answered in this way?

A. Will you ask that question again?

Q. The question was "And as the freight train cleared, they started ahead," and you answered in that way?

A. Yes sir.

MR. SHERWOOD.

Q. Now you may explain, Mr. Gilfeather, if you have any explanation?

A. No, it is all right that way.

MR. TORREY.

Q. Then you saw both the woman and her boy jump out of the wagon?

A. Yes sir.

Q. How long before the passenger train hit the wagon, did they jump?

A. They jumped just as the passenger train was right there, as near as I could see, the train hit the wagon as they jumped.

Q. When did you first hear the passenger whistle?

A. I first heard the passenger whistle when it was about 800 feet down the track.

Q. Eight hundred feet down the track?

A. Yes sir

Q. Did you see the passenger train?

A. Yes sir.

Q. You saw it approaching?

ROY WALLACE, Recalled by Defendant For CROSS EXAMINATION

MR. TORREY.

Q. Mr. Wallace, you were in charge of this job over there?

A. Yes sir.

Q. And I presume you agree with Mr. Gilfeather that you were standing on a ladder, also as he was?

A. Yes sir, same ladder, only lower, not very much though. He kinder had his feet on the ladder, and half on the house and half on the ladder. My head was above the top of the ladder.

Q. Your head was above the top of the ladder?

A. Yes, the ladder shoved in against the eaves —just above that shape.

Q. He was under the eaves?

A. Yes, and his feet on, kinder sitting here, and my head above the ladder.

Q. Where was the ladder?

A. On top of the roof.

Q. Did you have a clear view of the tracks?

A. Yes, sir, a clear view.

Q. You were also sworn before the Coroner's Inquest, were you?

A. I was.

Q. Didn't you then testify that a tree obstructed your view?

A. I said there was a tree in the outside foreman's yard that probably obstructed for about a second, kinder shaded it a little from the time I first saw it, or after it hit the wagon—about between the two

Q. Were you asked this question? "Q. From your position on the building, where you were, how far south on the tracks could you see" and you answered. "Well, you could not see very far on account of a big tree right in the outside foreman's yard; there is a tree there, and you cannot see much more than fifty or sixty feet below the crossing."

A. That was testified at the inquest, but after I went to the yard, and seen I had a full view of it, I could answer it.

Q. Your remembrance now would not agree with what it was then?

A. No, sir, because everything was excitement at that time; I answered a good many things that after I went there and looked at it, thought it was different

Q. When did you look it over again?

A. I could not tell you what date—I have been there twice since.

Q. This winter wasn't it?

A. No, sir right after I finished the work, I went to collect some money.

Q. When did you go to examine it, wasn't it within two or three weeks?

A. I have been there two or three times, I couldn't tell the date.

Q. Will you try to fix the time when you made the examination which made you change your mind?

A. Oh that would be pretty hard to give you—I should judge about three weeks after it happened.

Q. How did you happen to make that examination at that time?

A. I did some work for John Hexter, and I went there to collect some money, and while I was there I looked it all over

Q. But this inquest was about three weeks after the accident?

A. I didn't say after it happened, I said three weeks after the inquest; after I gave the explanation I went to look it over and see how far right I was.

Q. What train did you notice?

A. I saw a freight train.

Q. Could you from that distance, 940 feet away, tell what track it was on, with certainty?

A. Yes, being up high throws you a little closer, and gives you a better view of the tracks than it would when I was on the ground.

Q. You were not much above the level of the tracks were you?

A. Yes sir considerably.

Q. When you went back to make this new ex-

amination, three weeks after, or some time or other, where did you go to make the examination?

A. I was on the track where the boy was killed, and I was also at the house.

Q. You were not up on the ladder then, were you?

A. No, sir, I wasn't on the ladder; I wasn't up on the ladder, I could see from the ground just as well because there is no house in front, only the outside foreman's, and his is on the corner.

Q. But you could hardly tell the effect of the tree, from the ground, could you?

A. Yes, when I seen just where the train laid.

Q. Isn't the tree right in line with the crossing from the corner of the house?

A. No, sir, it is not.

Q Which track did you say this freight train was on?

A. The first track.

Q. The first track toward you?

A. Yes sir.

Q. Didn't you say before the coroner's jury, it was on the other track?

A. I am not sure if I stated it or not, but after I seen the tracks again I could tell better. The night of the inquest I didn't take any notice of anything in particular until I looked it over again to make sure.

Q. Your recollection was certainly more vivid than it is now?

A. Oh, no, not at all, there was lots of excitement.

Q. Wasn't there some map there at the inquest, which you looked at?

A. Yes—no—there was no map, there was a hand sketch.

Q. Then your impression is that you said, at the inquest, that the freight train was on the third track?

A. I am not sure if I did or not.

Q. How many cars were in that train, according to your recollection?

A. I haven't any idea—it was a good long train, a good long trip of cars, and caboose on the end of it.

Q. And an engine ahead?

A. And engine ahead.

Q. Going south?

A. Going south.

Q. Where was the engine, when you first saw the train?

A. When I first noticed the train, they were just crossing the crossing—well, I should judge about maybe half a dozen cars or so ahead of the crossing.

Q. Where was the woman at that time—this plaintiff?

A. The woman was waiting for the cars to pass.

Q. Very near, was she, to the track?

A. I could not say exactly,—I should judge—my opinion on it, may be twelve or fifteen feet away; I am not sure; if it was any closer than that or not I could not tell you.

Q. As soon as the train cleared, she started over, did she?

A. No, sir, she didn't; she waited until the train got down a short distance, and kinder looked up and down, and I seen her start across.

Q. You say she didn't start right across immediately after the train went over?

A. No, sir.

Q. How far away would you say the passenger train was when you heard the whistle?

A. The passenger train was probably a little south of the whistle post.

Q. A little south of the whistle post?

A. Near by the whistle post when I first noticed it.

Q. What kind of a whistle was blown?

A. Just one long whistle.

Q. You heard it whistle, did you, at the whistle post?

A. No.

Q. How far was it south of the crossing?

A. It didn't blow after it got south of the crossing at all.

Q. How far was it south of the crossing when it blew, after it got this side of the whistle post?

A. About 100 or 200 feet, when it got this side of the whistle post.

Q. Did you see Mrs. Flannelly and her boy jump out of the wagon?

A. I could not say if they jumped or got throwed out, or what, I seen them make a quick move, and seen Mrs. Flannelly land right close to the track, and the engine hit the wagon.

Q. You would not be able to say whether she jumped or not?

A. No, sir, I wouldn't want to tell a lie.

Q. She simply got out of the wagon on her own account?

A. I don't know if it was her own action, or the train's action; I simply seen her go, and land right close to the track.

Q. Did you not swear as follows, at the inquest. Were you not asked this question, and did

you not so answer: " ". Was there any train on the track nearest to you?" and did you answer "No sir, there was not, that was clear, and just as it happened, I kinder said to the boy "no wonder they got killed, you cannot see a passenger coming up here when freight train is going down. You cannot see it."

A. Yes sir both of us answered that. The Lehigh Valley tracks were clear, and the D. & H. train was on the first track. Three tracks near us—only we get to the D. & H. tracks there is two tracks down in the hollow that comes first—they were clear.

Q. Those Lehigh Valley tracks which were down in the hollow were never mentioned at all?

A Yes, sir, we were asked if the tracks nearest to us was clear, and I said they were.

Q. I simply ask you whether you answered as I have read?

A. Yes, sir, I answered the tracks nearest to us, and I said they were clear when the train passed.

Q. You have studied that up?

A. I don't have to study it, it is the truth.

Q. Did you answer these questions as follows, before the coroner:

> "Q. You didn't see the boy try to jump from the wagon (that is the boy that was killed) or whether he got knocked from the wagon.
>
> " A. From what I seen, the woman and the boy—we heard her holler awful plain, and it was a clear day, and I heard her say something like "jump" and she gave an awful scream, and she and one boy jumped, and the other boy was standing up in the wagon as if he was going to jump, just as

the engine came. I could not say whether he jumped or not."

Did you answer that question in that way?

A. I am not sure. If I answered that way or not; I seen her making motions to get out, and that is all.

Q. Whether you answered in that way or not?

A. I say I am not sure about that question.

Q. Then you admit you answered it in that way?

A. Ask those questions again please, till I understand it a little better?

Q. "Q. You didn't see the boy try to jump from the wagon, or whether he got knocked from the wagon?"

"A. From what I seen, the woman and the boy—we heard her holler awful plain, and it was a clear day, and I heard her say something like "jump," and she gave an awful scream, and she and one boy jumped, and the other boy was standing up in the wagon as if he was going to jump, just as the engine came. I could not say whether he jumped or not

Did you so answer?

A. No, sir I did not.

Q. Now at the time she started to cross the tracks, after the freight train had gone by, did she have a clear view; could she see the passenger train approaching when she started across?

A. No, sir, she could not.

Q. Before the coroner's jury, were you asked this question, and did you make this answer: "Q. And it (the passenger train) must have been clearly in view at that time?" Answer "It must have been in their

view at the time they started across the track." Did you so answer?

A. No, sir, I did not.

JOHN FLANNELLY, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mr. Flannelly, you are the husband of Mary Ellen Flannelly, the other plaintiff in this case?

A. Yes sir.

Q. And you are one of the plaintiffs?

A. Yes sir.

Q. How old a man are you, please?

A. I should judge was about 52 years of age.

Q. You live—

A. At Langan station in Pittston township.

Q. You didn't see this accident?

A. No, sir.

Q. Were you home when it happened?

A. Yes, sir.

Q. Were you home when your wife left in the morning?

A. Yes sir.

Q. Was your wife accustomed to driving horses?

A. Yes sir.

Q. The horse that she was driving that day, was it kinder roadworthy?

A. It was a fine good all round horse; you could fetch it any place, a woman or man could drive anywhere.

Q. What was the character of the wagon?

A. It was a light lumber wagon, would carry from—I reckon about 1500.

Q. Was it yours?

A. Yes sir, I made it myself.

Q. Did you build it?

A. Yes sir.

Q. What was the cost of the wagon?

A. I should value that wagon at about $50.

Q. Did that include your work?

A. No, sir.

Q. How long had it been in use at that time?

A. The wagon I built the winter before, and I used it that spring.

Q. What effect did this accident have upon that wagon?

A. It broke the hind part of it, and smashed the seat they were sitting on into pieces.

Q. Is the whole wagon destroyed?

A. Yes sir.

Q. Or can it be repaired—Was the horse hurt?

A. No, sir, but the harness was broke on him.

Q. Do you wish to make a claim for the harness—What is the bill for the harness?

A. I didn't put in a bill of the harness.

Q. Now what is the first you knew that the accident happened to your wife?

A. My son came home from work and told me, I was in the field trying to make hay, trying to make some hay; it was kinder—the day was gloomy and damp, and I could not start in the morning very well to shake my hay; I had to stack my little stacks, and I was raking the ground—

Q. What time was it you were trying to shake out your hay?

A. It was between 10 and 11 o'clock.

Q. What kind of a morning was it?

A. It was a damp gloomy morning.

Q. Who was with your wife—Never mind you

need not bother to tell that. What was the age of the boy?

A. A little boy between 11 and 12 years.

Q. Where did you first see your wife after the accident?

A. In Mr. Charlie Fleitz' house.

Q. That is the house close by Mrs. Aherns?

A. Yes sir.

Q. What time of the day?

A. I should judge it might be something after 2 o'clock—I could not say.

Q How far did you live from the Fleitz house?

A. I should judge it would be four miles, may be a little more, or a little less.

Q. How did you get down there from your home?

A. I went over to Mr. Davis' and got his horse and he drove me down, Charlie Davis, not Charley Davis, but Harvey Davis.

Q. What is the condition of your health?

A. It has been very poor for the last three, going on four years.

MR. TORREY:

We object to that question. I don't know that that is material at all.

THE COURT:

It doesn't matter what his health was,

MR. SHERWOOD.

Q. What was the condition of your wife, when you got there?

A. When I got there, it must have been just as I was striking the house she started to stumble toward me, and I ketched her in my arms, and I have loved her the whole world.

Q. What was her condition, apparently?

A. She was in bad shape, complaining of her left side and the side of her head.

Q. Go on and tell us how she acted?

A. And she acted as if she was in great pain, and agony, and then she tried to tell me, and she says "Howard is killed" and I seen she was in such agony around the place, I didn't want to start any questions at all; I told her to sit down on the sofa there, and she sat down there, and I sat there a while; and I went over to the crossing myself then, and as I got there the detective was there to examine the wagon, or what was left after the wreck—the detective got there too. He was there, I asked first, are you Mr. Neary, and he says "yes" and I says "what do you think about the wreck."

MR. TORREY.

We object.

MR. SHERWOOD.

Q. You saw Mr. Neary there, the detective?

A. Yes, sir,

Q. The detective for this company?

A. Yes, sir.

Q. When did you take your wife home—or did you assist in taking her home?

A. I took her home myself

Q. The same night?

A. Yes sir.

Q. What was done with her when you took her home?

A. We put her to bed.

Q. Can you give us some practical idea how long she remained in bed?

A. She had been in bed and we sent for the

doctor, and the doctor got there in the morning as soon as he could—he wasn't home when the boy went there after him—I couldn't say what time it was when he got there.

Q. Was it before daylight he got there?

A. No, sir, it was after daylight.

Q. What doctor?

A. Doctor Pier.

Q. He is from where?

A. From Avoca.

Q. How far is his place from yours?

A. It should be—I should judge about 4 miles; it may be a little more, or a little less, but I would not say that.

Q. Now about how long a time was your wife confined to the bed from those injuries, before she got out at all, if you recollect?

A. About six weeks.

Q. Then after that?

A. Then she would get up and go back to bed again—back and forth.

Q. What do you know, if anything, about her having a mis-carriage starting in, in August 4th?

A. I know it was there, I didn't examine it.

Q. What was her condition at that time, as to pain and suffering?

A. Very bad suffering, and all slimy, and blood and stuff coming from her.

Q. Do you know about the condition of the flow of blood that came afterwards?

A. Yes.

Q. For how long?

A. Well it come right along for two or three weeks continually.

Q. Small or great quantities?

A. Well there was quite a quantity of it.

Q. During the time she was in bed, whether she was able to assist or care for herself?

A. No, sir, she wasn't able to assist herself, she had to be helped.

Q. Is she able now to care for herself, by way of dressing herself?

A. No, she is not able to take care of herself now.

Q. Where were the apparent injuries—where were the injuries that you saw?

A. Right on her side here, and on the side of her head, around towards the spine of her back, and in here (indicating)

Q. You are now pointing—putting your finger about the position which would be over the left ovary and around back to the kidney in the left side —back?

A. Yes.

Q. And the left side of the temple, or head?

A. Yes sir.

MR. TORREY:

I object. Let the witness indicate.

MR. SHERWOOD.

Q. What care has she found it necessary to have since the accident?

A. Well she didn't do much of anything—didn't seem to care much for anything, only very little of anything she eats, and she didn't seem to have her own mind twenty minutes when the is in the house.

Q. Have you had any help by way of a nurse —did you at first?

A. Yes sir.

Q. What was her name?

A. Mrs. Thomas.

Q. Do you know how long you had her?

A. She was there about two weeks.

Q. Did you have to pay her?

A. Yes sir; I didn't pay her yet though.

Q. What is the amount of her wages, do you know?

A. Would be $15 a week.

Q. Is she able now to do her work?

A. My wife?

Q. Yes.

A. No, sir; I wish she was.

Q. Just tell us how she is handled now, so far as you can?

A. Well in the mornings, she tries to get around; she might get up a few minutes, and go back to bed again; and around a few hours and go back and lay down; we take her out for exercise, with a wagon we have, and fetch her out, but she ain't able to do any work of the simplest kind.

Q. What was the condition of her health prior to the injury as to being healthy?

A. There wasn't a blemish on that woman; she was just as straight as a United States Dollar.

Q. Sound and well, was she?

A. Yes sir, there wasn't a blemish on her, she was like a rose.

Q. What was her condition as to weight and size, as compared with it now?

A. I could not really state it.

Q. Has she fallen away in weight?

A. Certainly she has; she has fell; she used to be 142 lbs; we weighed her the other day—I was down to Wilkes-Barre, and I seen some scales, and I

says to my wife, "get on here, and I will see how heavy you are—

MR. TORREY.

We object, and ask to have the answer stricken out.

MR. SHERWOOD.

Strike it out—You must not tell what was said.

Q. How much did she weigh at that time?

A. She weighed 121 lbs. last Thursday; I could not tell whether it was Thursday or Wednesday with a heavy coat on?

Q Of what trouble does she seem to suffer now—what physical trouble; apparent physical trouble?

A. Her side, and her neck.

Q. What is the condition of her neck—apparently?

A. Why it is crooked.

Q. Crooked?

A. Yes, sir.

Q. Drawn over—Was it in that condition at all before she was injured?

A. No, sir.

Q. What is the apparent condition of her back?

A. Why she cannot straighten herself up, as she ought to.

Q. Was she crooked, in that respect, before she was injured?

A. No, sir.

Q. Now tell us, Mr. Flannelly, if you please, what kind of work she used to do for you; what did she do before she was injured; in the first place what is the size of her family?

A. Only ten.

Q. Ten children?

A. That is all.

Q. How many at home?

A. I have seven—eight to home now.—Well, I don't know whether they are home now or not, there are some of them here.

Q. I mean, living at home?

A. There is 9 home, I should say.

Q. Nine living at home?

A. Yes.

Q. One is dead?

A. Yes sir.

Q. So that your family—your whole family is living at home, except one?

A. Except one—there is one away from there—there is one away from there, one boy.

Q. How old is the youngest living there now?

A. About five years.

Q. Prior to the injury, who looked after your home. and looked after the family?

A. My three—four girls now.

Q. Before the injury, I mean?

A. Before that; I used to keep two of them home, doing the work, to assist my wife.

Q. How old are the girls?

A. One of them 18 and the other is about 16—aud the other one must be about 12 or 13, may be a little more--.I haven't got their ages down very fine.

Q. With the assistance of your own children, who else took care of your home, and the needs of the home, before the injury?

A. My wife—she looked after it, to see that they done it.

Q. What was your work—what was your business?

A. Farmer.

Q. Were you able to farm—yourself?

MR. TORREY.

I object to the question.

A. I used to try a little.

MR. SHERWOOD.

Q. What part of the farm work did she do?

A. Well, she could do a little of anything; you could start her out.

Q. Could she, and did she at times take care of your horse?

OBJECTION.

A. She would go out and feed them in the barn.

Q. What else?

A. And water them sometimes, and that is all as far as the horse, except driving, hitching them up and putting them in the wagon, and she would drive him in the wagon wherever she wanted to go.

Q. Did you keep cows?

A. Yes sir.

Q. Who assisted in doing the milking?

A. My girls done the milking and my boys done it sometimes.

Q. Did your wife assist any?

A. Well, very seldom.

Q. What other work did she do?

A. Looked after those folks around the house, and that was enough for her to do.

Q. Did she keep boarders?

A. No, sir—yes, some folks used to come from Pittston, and stay with us.

Q. Summer boarders were they—or the year round?

A. They used to stay there for two or three

years—we used to take them the same as our own—why we used to have—

Q. They paid you for it?

A. Yes sir they paid us for it.

Q. Who took charge of the house in that respect?

A. My wife took charge, and my girls had to do the work

Q. Can she take care of such work now?

A. No, because she cannot get around to see it half the time

Q. You are acquainted with this crossing in question?

A. Yes sir.

Q. How many years have you known it?

A. I have known that crossing for about—I have been going back and forward over it between eight and nine years, and I have seen the road there—I have seen the road that used to come down there the time they were putting the first rails on that track, I carried some of the spikes to fasten the first rails on that track.

Q. You have known it for how many years,—where the accident occurred?

A. I should say about twenty years.

Q. Do you know where the usual and customary place—stopping place is, where travelers in approaching the track, stop, look, and listen?

A. Yes sir.

Q. Where is it?

A About 25 or 30 feet from the crossing.

Q. Now how large a place—Do you know the population or about the population of the village of Dupont?

A. It is between four and five thousand.

Q. Can you tell me how many churches there are located there in that village?

A. There is one, as I know of, right in the little town of Dupont.

Q. What other town is there right near Dupont, if you know?

A. There is what they call Hughes-town Borough—Then you go into Pittston city, and a place they call Stone Run before you strike Pittston City.

Q. And what is this way, right in your locality?

A. Towards Scranton?

Q. Yes?

A. Avoca—a big place—there is three or four churches in there.

Q. Are there any breakers in the near vicinity of the crossing?

A. Yes, sir, breakers and shafts.

Q. Any barns?

A. Yes, sir.

Q. Stables?

A. Stables, and stores.

Q. Company stables?

A. Yes, sir, there is the company stables there

Q. Are there many houses?

A. Yes, sir.

Q. Company houses?

A. Yes, sir, in Smithville there is, but not in Avoca, as I know of—I believe they are all private houses.

Q. When you speak of Smithville, that is the same as Dupont?

A. Yes, sir, the same—used to call it Smithville some years ago.

Q. You take that region down through there—what is the great industry of the region?

A. Why the shafts, breakers, and there is mills—little stores here and there—butcher shops and of all descriptions.

Q. The leading industry is the coal mining is it not?

A. Yes, sir.

Q. And upon the railroad, is there a large amount of coal carrying to and fro?

A. Yes, sir.

Q. Do you know whether the tracks of the company are used greater or less at all times?

A. Yes, sir.

Q. Can you give us some definite idea how many through passenger trains they had at the time of the accident?

A. Yes.

MR. TORREY.

How does he know? We would like the source of his information.

MR. SHERWOOD.

Q. How many?

A. There is seventeen each way on the Delaware and Hudson, that would be thirty-four; there is three on the Jersey Central, each way, is six—is forty. I am leaving out two that was running at that time, would make 42; they have changed their schedule.

Q. They were regular schedule passenger trains at that time?

A. At that time.

Q. Can you tell us about the other trains, aside from the passenger trains, whether there are any trains?

A. I could not give you an account of them, but they are running back and forth all the time—freight trains, coal trains, empty engines, running back and forth all the time there?

Q. How about the Lehigh Valley tracks, close thereto?

A. Running back and forth there all the time too.

Q. And how about the Cannon Ball road near there?

MR. TORREY.

I don't think that has anything to do with this case, your honor, whatever.

THE COURT:

I think not.

MR. SHERWOOD.

Q. D you know whether the crossing is much used by the public?

A. Yes sir.

Q. Whether or not it is a road greatly used by—

MR. TORREY.

Just let the witness tell something now.

MR. SHERWOOD.

Q. By teamsters?

A. Yes sir

Q. Will you give us some practical idea; something that will be fair evidence?

A. Yes sir.

Q. You may do so?

A. On that public road, people from the city of Scranton, clean to Wilkes-Barre, goes back and forth every day; their wagons going back and forth over that road, and in that distance, those places, out in

the scattered places, not settled towns but little villages, little towns, and they have stores, shops, bakers shops, and they have wagons to run, and they are kept going there from morning till night, and when you come to this crossing, you stop there to look and listen, the trains behind you is puffing, and running back and forth, and when you get across the crossing you can thank the Lord you are safe, when you get over there.

MR. TORREY.

I object to that and ask that the answer be stricken out.

THE COURT.

Oh yes, strike that out.

CROSS EXAMINATION.

MR. WILL TORREY.

Q. Mr. Flannelly, where did you say you lived?

A. At Langans Station on the Wilkes-Barre and Eastern Road, at Pittston Township.

Q You say, with reference to this horse your wife was driving that day that it was road worthy—what do you mean by that?

A. He was a good all round horse

Q. A good all-round horse?

A. Yes sir.

Q. Was he lively, skittish sort of a horse?

A. He was kinder skittish sometimes.

Q. Was he a balky horse?

A. No, sir, I never seen him balk.

Q. The only damages you claim to the horse and wagon is the amount of $50 for the destruction of the wagon, as I understand you?

A. The destruction of the wagon, I value that at $50.

Q. How did you receive information that your wife was injured?

A. Sir?

Q. How did you receive information that your wife was injured at this crossing?

A. Well I thought there wouldn't be any use of having neighbors in this country if they couldn't tell you something.

Q. How did you learn that the accident occurred —when did you first learn of it?

A. My son came and told me.

Q. Was he the one that was in the wagon?

A. No, sir.

Q. Another son?

A. He was to work at the Hillside shaft.

Q. How did he learn of it, if you know?

A. He was told down in the mines.

Q. What time of day was that?

A. I would not say whether it was between—it was something around two o'clock may be a little after, not quite that much; I couldn't say what time it was.

Q. Then you say you went to Charles Fleitz'

A In Mr. Fleitz' house Charlie Fleitz.

Q. And when you saw her, what condition was she in?

A. She was in a very bad condition, and she was stumbling towards me; she got up from where she was sitting, and stumbled towards me, and I ketched her in my arms.

Q. Was she nervous and excited?

A. Yes

Q. Did you understand what she said at that time?

A. She said Howard was killed.

Q. You remember that; do you remember anything else she said?

A. No sir, not at that time. I told her to sit down—I didn't ask her any questions at all; I thought she was better lying down.

Q. Did she seem to be hysterical over the death of the child, she had charge of—Howard Toohill?

A. She seemed, all over her side, and over here, complaining of her side.

Q. What did she say— her own words, with reference to the complaining?

A. Her side and her head.

Q. How did she say it?

A. She said "my side is very sore"

Q. Just like that?

A. Yes sir "and the side of my head."

Q. Was that in response to a question from you? Did you ask her anything about it?

A. No, sir, she told me herself without asking her.

Q. You say your wife was confined to the bed for six weeks after this injury

A. Yes sir.

Q. And your children took care of the house during that period—your three daughters as I understand it?

A. My daughters, after Mrs. Thomas left there, took care of the house.

Q. Mrs. Thomas then was in charge of the house for how long?

A. For two weeks, looking after my wife.

Q. When did she come to the house?

A. She come there,—I could not say whether it was the second or third day Mrs. Thomas got there,

I cannot say as to that for sure; it was either the second or third day she got there.

Q. Now, with reference to this mis-carriage you have spoken of, just when did that occur?

A. On the 5th of August.

Q. That was five days after the injury?

A Well, it was on the 5th, yes sir.

Q. Now with reference to this crossing, you say you were acquainted with that; is it not true that there is another road that runs from Avoca up through the Heidelberg crossing, and breaker, and on up the valley?

A. Yes, there is four tracks there.

Q There is another road that runs up through Dupont?

MR. SHERWOOD.

You mean a public highway?

MR. TORREY.

Yes.

A. Yes where you cross over and come down across this crossing.

Q. But there is another road that runs through the main street of Dupont, that doesn't come over this crossing?

A. Yes, sir.

Q. Did you ever make any count of the wagons and foot travelers that have gone over this crossing?

A. I don't understand your question.

Q. Have you ever stood there and counted for any length of time, the number of wagons that go over this crossing, during a day, or foot travelers?

A. Not during the day—I have stood there waiting for trains to pass.

Q. You have never counted them, have you?

A. I have went there and stood there waiting for the trains to pass, waited for one particular train to go by, and I would look around, up along side the train, and be ready to drive in, and another would come along, and stop you, and there would be three or four wagons staring you in the face, waiting to go over and there would be no whistles blown or anything else.

MR. TORREY.

We object to the answer, and request that it be stricken out.

THE COURT.

Strike out the answer about not blowing whistles at other times.

MR. TORREY.

Q. Is it not true that the Jersey Central road uses that track, the Delaware and Hudson track, for all sorts of trains,passenger trains and freight trains, and coal trains?

A. I don't know whether the Jersey Central runs any freight train or coal trains, but I know they run passenger trains every day. Whether they run any freight trains or coal trains—I don't know about that.

Q. Is it not true that you have brought suit in this court for an injury to your boy, which happened at this same time?

MR. SHERWOOD.

I object.

THE COURT.

I think you may ask that.

(Question repeated by the stenographer.)

A. Yes, sir.

THE COURT.

That is another suit.

MR. SHERWOOD.

Yes, your honor.

WILLIAM LEIDY, sworn for plaintiff.

DIRECT EXAMINATION

MR. SHERWOOD.

Q. Mr, Leidy, how old a man are you?

A. 54 the second of last November.

Q. Where do you live?

A. I live in Pittston Township.

Q. How far from the crossing where this accident is said to have occurred?

A. Well, about a mile, as near as I can guess at it.

Q. Are you acquainted with the crossing in question, and the approaches thereto?

A. I am acquainted with the crossings.

Q. You know where this crossing—Snaith's crossing—is?

A. Yes, sir.

Q. For how many years have you known that crossing?

A. Ever since it has been a crossing.

Q. Can you give us a practical idea how many years that has been there?

A. No, I could not just exactly tell you how many years it has been there.

Q. Quite a number of years?

A. Yes, quite a few years.

MR. TORREY.

It was built in the early seventies.

MR. SHERWOOD.

Q. You know where the usual and customary stopping place for travelers, driving over that crossing, as Mrs. Flannelly was driving, or trying to, is, to stop, look and listen, on this side of the crossing?

A. That depends on what kind of a team you have got.

Q. If you have an ordinary quiet horse?

A. If you have an ordinary quiet horse, it is all right to stop 12 or 15 feet; if you have a skittish team, you will stop quicker.

Q. So it covers a few feet, from 12, 15, 20, 30 or 40 feet back?

A. Yes sir.

Q. What do you know about the use of that railway by the railroad companies, whether it is largely used or used but little?

A. Why it is used pretty largely—I should call it largely; of course I didn't stop there right by it all the time.

Q. Do you use it all times—quite often?

A. I average across there from two to three times a month.

Q. And have for a number of years?

A. And have for a number of years.

Q. Has the use of the road been increasing from time to time?

MR. TORREY:

I object to the question.

THE COURT:

It doesn't matter about that.

MR. SHERWOOD.

Q. How was it used, if you can give us a fair idea—if you think as a fair witness—if you don't

think you can, don't try, but as a fair witness, coming here to testify under oath, if you think that you can give us a practical idea how that railroad was used about that time, I wish you would do so?

A. I could not give an idea of that; as I told you before. I ain't there only as I pass over.

Q. What have you observed at times when you have passed over?

A. Sometimes you meet a couple of trains along what you call the Red Row—sometimes you will meet three or four, and sometimes you only meet a couple, and sometimes, of course, none.

Q. What have you observed, if anything, as to the use of this highway by the general traveling public?

A. Why it is a regular public highway for teams to go back and forth.

Q. Is it much used?

A. Yes, used considerably.

Q. Is it traveled a great deal also by foot-travelers?

A. Oh yes, foot-travelers travel it.

Q. Whether or not that locality and region is a great business centre?

MR. TORREY.

We object to the question as leading.

THE COURT.

Yes, it is leading, and, haven't you gone into that sufficiently?

CROSS EXAMINATION.

MR. TORREY.

Q. What is your business, Mr. Leidy?

A. Farmer.

Q. How far do you live—about a mile from the crossing?

A. About a mile from the crossing.

Q. And your use of it is confined to two or three times a month?

A. Sometimes that, and sometimes oftener, and sometimes not so much. I cannot tell how much I do travel that.

Q. When you do travel over it, where are you going?

A. To Pittston.

Q. You live east of this crossing, do you?

A. Yes, sir.

Q. And you live about in the same direction that the plaintiff does, Mr. and Mrs. Flannelly?

A. Yes sir, only he lives further back

Q. Further back in the same direction?

A. Yes sir.

Q. You go over the same road?

A. Well, not exactly; he lives at Smithville—a different road there from what I come.

Q. From the east side, there is a highway also down through Dupont and over by the Heidelberg No. 2, isn't there?

A. Yes sir.

Q. That is more traveled than this, isn't it?

A. Well—no, the one is traveled about the same as the other.

Q. You never took the trouble to count the number of teams there, I suppose?

A. No, sir.

Q. And you have often had the good fortune to cross there when there were no trains there at all?

A. I have crossed when there were no trains, and I have waited for trains.

MR. SHERWOOD.

Q. Did you know Mrs. Flannelly before she was injured?

A. Yes sir.

Q. What was the condition of her health, before she was injured?

A. She seemed to be a good stout rugged woman.

MR. TORREY.

Q. How often did you see Mrs. Flannelly?

A. Oh, sometimes a couple of times a year.

Q. What was the nearest time to July last that you saw her, before the accident—can you tell us?

A. I could not, just exactly; might be along in the spring some time, as near as I can get at it,—I couldn't just state the time?

Q. Where did you used to see her?

A. I used to see her sometimes pass by my place, and sometimes I used to pass by her place.

Q. She never was a very stout woman, was she?

A. Why medium size, good straight able woman.

Q. I mean, she wasn't fleshy?

A. She wasn't as fleshy as some, but she was fleshy for her build.

Q. Have you ever been to the house since the accident, at all?

A. No, sir.

Q. You never stopped there at any time, I suppose?

A. Well, I did work for them four or five years ago—I done a couple of days plowing; but I ain't a great visitor; I don't run around unless I have business.

FREEMAN LARNARD, sworn for plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mr. Larnard, how old a man are you?

A. 29 years old.

Q. How far do you live from the crossing in question?

A. Fifteen miles.

Q. Whether or not you have formerly lived in the village of Dupont?

A. Seventeen years.

Q. Near the crossing in question?

A. Yes, opposite the crossing.

Q. Are you well acquainted with this crossing?

A. Yes, sir.

Q. Have you ever driven teams?

A. Yes, sir.

Q. Whether or not, in your experience, you have observed the usual and customary place where teamsters in approaching that crossing, in the way Mrs. Flannelly is said to have crossed it, stop, look and listen?

A. Yes, sir.

Q. Where is that place?

A. About—anywheres from 15 to 25 feet from the crossing.

Q. Can you give us some practical idea, that you think would be fair in the case, for the jury to consider, as to the amount of rail road traffic, and the way those roads are used there—the railroads, by the different trains?

A. Well, it is some five years since I lived there, but I have been there off and on; that railroad is used considerable, but I cannot give

the exact time, or the amount of trains that travel the road.

Q. Is it a point at which there is a great amount of traffic, as you would estimate it—would it be fair to say that, or a small amount?

A. There is a large amount of traffic that crosses the road.

Q. Do you know that this point is between breakers?

A. Yes sir.

Q. And is there a great coal-carrying industry over that road?

A. Yes sir.

Q. By how many different roads—that crossing right there—

A. The Lehigh Valley—You mean railroads?

Q Yes?

A. There is two Lehigh Valley tracks below it, and one on the other side of it; and street car track, and Cannon Ball.

Q. And what else right there at the crossing I am referring to; how many Jersey Central tracks?

A. I don't know of any Jersey Central tracks. I never knew them but D. & H. tracks.

Q. How many?

A. Three.

Q. You know that the Jersey Central and the D. & H. also used that same track?

A. Yes, sir, I have rode over the Jersey Central across on their tracks.

Q. Can you give us some fair evidence, what you think is fair for a jury to consider, in estimating how the crossing at that point is used by the traveling public?

A. It is a much used crossing. It is a crossing,

and leads from Pittston to Avoca; it is a short cut instead of going around through the upper side of Dupont; it is a short way across, and it is a crossing that is much used by the public traveling, and coal hauling to Avoca from the valley—all has to cross those crossings.

CROSS EXAMINATION

MR. TORREY.

Q. You say the Jersey Central uses those tracks?

A. Yes sir.

Q. For all sorts of trains I suppose?

A. I could not say for that, but for passenger trains they use them, I have rode on them.

Q. You never took occasion to count the number of wagons or foot-travelers that go across there?

A. No, sir.

Q. You haven't, since you moved from Dupont, been there much?

A. I have been there off and on all the time, ever since I moved from there?

Q. How often?

A. Sometimes once a week, sometimes five or six times a month, and sometimes not quite so often.

WILLIAM HARLOS, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mr. Harlos, where do you live?

A. Pittston Township.

Q. How far from the crossing in question?

A. About four miles as near as I can judge.

Q. For how many years have you known the crossing in question?

A. Ever since it has been there; I have lived out on that same place for 25 years now.

Q. Do you drive a team at times?

A. Yes sir.

Q. Have you used the crossing frequently yourself?

A. I do.

Q. And see others use it frequently?

A. Yes sir I do.

Q. In approaching the crossing from the way Mrs. Larnard is said to have approached, do you know where the usual and customary place for stopping, look and listen is?

A. Yes sir.

MR. TORREY.

We have finished the Larnard case Mr. Sherwood, let us get down to this case.

MR. SHERWOOD.

I mean Mrs Flannelly.

A. Yes sir, I understand that.

Q Where is that point?

A. In Dupont, between Scranton and Pittston.

Q. You say you know where the usual and customary stopping place is?

A. Yes sir.

Q. Where is it?

A. Anywhere from 20 to 30 feet, according to what team you have.

Q. Can you give us what you think would be a fair practical idea of the amount of traffic that the railroad carries on at that point?

THE COURT.

You need not dwell upon that.

A. I cannot say much, but there is quite a lot of travel on them roads.

CROSS EXAMINATION

MR. TORREY.

Q From the point where you would stop, just before you get upon the track, you have a very long view both up and down, haven't you?

A. Well, sometimes, and sometimes you have not; I have been there when they were blocked up with cars loaded with coal.

Q. I say when it is unobstructed, you have a clear view.

A. Not very.

Q. When there is nothing in the way, you have a long view both ways?

A. Not so very long, there is a bank on one side as you come from Dupont over towards Pittston; if you come from Pittston this way, you have a bigger view than when you go from this way over that way.

Q. You don't mean to say that there is anything that obstructs the view in the way of a permanent bank or anything of that kind?

A. There is a bank—the road leads along the hill.

Q. It is not high enough to obstruct anybody's view, when they are standing, just before you cross, is it?

A. You can see a little distance, that is right.

Q. Cannot you see 1500 or 2000 feet toward Heidelberg No. 2?

A. Well, now I never looked exactly, but I don't think you can.

MRS. ANNIE LARNARD, sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mrs. Larnard, you remember the day of this accident.

A. No, sir.

Q. Do you remember being in Dupont when the accident happened?

A. Yes sir.

Q. Where were you when the accident occurred?

A. I was right there, out in the field by Mrs. Aherns' house.

Q. What were you doing?

A. Hanging clothes on the line.

Q. That is a clothes line between Mrs. Aherns' house, and the crossing?

A. Yes, sir.

Q. Were you facing the accident, or had your back toward it?

A. My back towards it.

Q. Did you see the accident itself?

A. No, sir.

Q. What is the first you knew about it?

A. The first I knew of it I heard Mrs. Flannelly screaming.

Q. You heard Mrs. Flannelly screaming?

A. Yes, sir.

Q. Had the passenger train stopped at that time?

MR. TORREY.

I object to the question as as leading.

MR. SHERWOOD:

I withdraw the question.

Q. You heard her screamiug?

A. Yes sir.

Q. Was that before, or after the accident occurred?

A After the accident had occurred.

Q. Now what did you do then, after you heard that, if anything?

A. I went over.

Q. Just tell us how she was acting, and what was her condition, apparently?

A. She was in a very bad condition when I went over there, and she was just as though she was out of her mind; but she didn't know anybody at all when I went over there.

Q. Tell us how she was acting?

A. She was pounding her hand on the ground.

Q. Pounding her hand on the ground?

A. Yes, pounding her hand on the ground.

Q. Flopping around with her body?

MR. TORREY

I object to the question.

MR. SHERWOOD.

I withdraw the question.

Q Can you explain a little more in detail?

A. No, sir, I cannot.

Q. Did you hear any signals given by the train, when it came?

MR. TORREY.

I object to that, your honor. I don't think she was paying any attention.

A. No, sir.

MR. SHERWOOD.

Q. Have you good hearing?

A. Yes sir.

MR. TORREY.

I was about to observe, your honor, that the courts have held in a great number of cases that the mere fact that a witness, who was not paying any attention and didn't hear a signal, is of no value whatever, as evidence, either to contradict positive and affirmative testimony, or raise a presumption that there was no signal.

THE COURT.

I will strike it out if you suggest? Let the answer be stricken out with regard to her having heard no signals, her attention was not directed to it.

MR. SHERWOOD.

Q. You were within hearing distance of the train?

THE COURT:

How near was she?

MR. SHERWOOD.

Q. How near were you to the crossing in question?

A. I cannot tell exactly how near it wrs.

Q. Was it right in there, across the creek, there?

A. Yes.

Q. You were between the house where Mrs. Ahern said she was on the porch, and the crossing?

A. No, I was right out in the open field?

Q. That is between the house where she was, and the crossing?

A. Yes sir.

Q. And you were nearer to the railroad than the Ahern house?

A. Yes sir.

Q. And between you and the coming passenger train there would be nothing, unless it would be a train, to interfere with sound, would there?

A. No, sir.

Q. Could you hear a whistle from, say down near the Viaduct, or above there; was there any reason why you couldn't hear a whistle if one had blown?

A. No, sir.

Q. Is your hearing good?

A. Yes sir.

Q. And was at that time?

A. Yes sir.

Q. Did you hear any signals given, on that train?

A. No, sir.

CROSS EXAMINATION.

MR. TORREY.

Q. You were not paying any attention, were you, to the train?

A. No.

Q. You were attending to hanging up your clothes?

A. Yes; I had my back turned, and was hanging up the clothes.

Q. You didn't notice any whistles at all while you were out there, did you?

A. No, sir.

MRS. SUSAN THOMAS, sworn for plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mrs. Thomas, were you acquainted with Mrs. Flannelly before the injury?

A. Yes, sir, for seventeen years.

Q. What was the condition of this woman's health before she was injured?

A. She was in good condition, and I have known her right along, now and again?

Q. Whether or not you were called to attend this woman, after she was injured?

A. Yes, sir.

Q. When?

A. The 4th of August—no the 4th of August it happened,

Q. When were you called to the house?

A. The third day after it happened.

Q. That would be about the second of August?

A. Yes.

Q. What was the condition you found her in?

A. I found her in a critical condition.

Q. What occurred to her while you were there?

A. Well, she had a mis-carriage while I was there.

Q. When did she have the mis-carriage?

A. On the 4th of August, Saturday—on a Saturday.

Q. What time?

A. Well—what time in the day do you mean?

Q. Yes?

A. It was sometime in the afternoon.

Q. Did you see the foetus?

A. Yes, sir.

Q What can you tell about its age?

MR. TORREY.

I don't know that she can qualify: that is a matter of expert opinion.

THE COURT.

It doesn't matter.

MR. SHERWOOD.

Q. For how long did you attend her?

A. Two weeks afterwards.

Q. What are you charges for that—what were you to receive?

A. Fifteen dollars a week I charge.

Q. Now what was her condition during all the time you saw her there as to pain and suffering?

A. Well she was in great pain, right along while I was there.

Q. What was her condition as to being weak or strong?

A. Very weak, she couldn't help herself at all.

Q What did you observe, if you observed anything, as to the woman's flowing and bleeding, after the miscarriage?

A. Yes, very much.

Q. Was it a usual, or an unusual amount?

A. An unusual amount.

A. For how long did that condition last?

A. While I was there.

Q. All the time you were there?

A. Yes, sir.

Q. Was she still flowing when you left?

A. Yes, sir.

Q. Can you give us some practical idea as to quantities?

A. No, I could not.

THE COURT.

We will let it go at that.

MR. SHERWOOD.

I would like to know whether it was enough to drain the system and weaken her.

A. It was enough to drain her system.

Q. Have you seen Mrs. Flannelly from time to time since this accident?

A. Yes sir.

Q. What has been her condition—How often have you seen her?

A. I have seen her about three or four times since, and I have found her in a very bad condition, right along; worse than what I expected to see her.

Q. What is her condition now, apparently, as compared to her condition before she was injured?

A. A great lot—She was in perfect health before it happened. I think if a woman can work out in the field, I think she is in perfect healthy condition, and she could do that before it occurred.

Q. To take her looks, her general condition, as you saw it, and see it now, how does she compare with her looks now?

A. She was a bright active woman before, and she is not now.

Q. And in regard to her weight, and size, whether you have noticed any change?

A. Oh yes, a considerable change in her.

Q. Growing more fleshy, or thinner?

A. Much thinner.

Q. Does this falling off of flesh appear to continue, or not?

A. Yes, continues, to me anyway.

Q. Did you see the bruises on her person?

A. Yes.

Q. Where?

A. Right along here—her side here, all the way down nearly, and her head here (indicating) there was a bruise on the left side of her head here.

Q. Can you give us some practical idea of the extent of that bruise on the left side of the head?

A. Well, it was just like a blow, you know, and reddish, the bruise was.

Q. I mean the size, was it as large as one's hand?

A. Yes, sir.

Q. Now, where was that?

A. Right here (indicating)

Q. Where?

A. On the left side here (indicating)

Q. Did you observe whether there were any bruises down this way, on the side, near the temple?

A. No, I didn't notice any on the other side.

Q. What did you observe as to bruises in the in the region of the ovaries?

A. Yes, a little.

MR. TORREY

We object to this method of examination, your honor.

MR. SHERWOOD.

Q. What other bruises did you observe?

A. Right along here, down the side, all the way down.

Q. What was the color of the person at those points?

A. Well, just like a jelly, it seemed to me, up here anyway, at the side.

Q. You know what we commonly call blood-shot, was it in that condition, would that be fair to say?

A. Yes, about that condition.

Q. Was it swollen?

Objection.

THE COURT.

Let her describe it.

A. Yes, it was swollen quite a little.

MR. SHERWOOD.

Q. Tell me if there was anything else; you are an intelligent woman, without my asking you the question—they object to my asking you leading questions.

A. I found her in an awful condition, I didn't think to find her in such a condition, because I knew the train didn't hit her, and I didn't expect to find her in that condition, but I found her in a very bad condition.

Q. Of course you didn't see the accident, yourself?

A. No, sir I didn't see the accident, I only went to nurse her, that is all.

Q. What was the condition of her mind when you saw her?

A. When I saw her first, after it happened?

Q. Yes?

A. It didn't seem she had a mind at all, to me; that is at times, you know, she didn't have a mind, at times.

Q. What, if anything have you observed: I would like to get a fair understanding of her condition of kind down to date, at the times you have seen her—would you say she has a mind at all times?

A. No, she has not got her mind at all times now—she has not.

Q. From your knowledge of the woman's complaints, and particularly of the condition in which you found this woman, as an experienced woman yourself, would you say that her suffering was little or great?

MR. TORREY.

We object to the question, because the witness has not been qualified—

THE COURT.

Well, she has said that it was great.

MR. SHERWOOD.

Q. You are not a regular trained nurse, are you?

A. No, not a regular trained nurse, no sir.

Q. What do you do, in time of sickness?

A. Well, I attend to everything when I am there.

Q. You go out nursing?

A. Oh yes.

Q. How many years have you been doing that?

A. Well, about 18 years now. I nursed her about 18 years ago—Mrs. Flannelly.

Q. So that so far as the regular training is concerned, you mean you have not been through the hospital training?

A. Oh no, I have not.

Q. But you have the training of experience?

CROSS EXAMINATION

MR. TORREY:

Q You are a married lady, Mrs. Thomas?

A. Yes sir.

Q. Your husband is living?

A. Yes sir.

Q. Where do you live?

A. I live in West Pittston.

Q. Do you follow nursing as an occupation?

A. Oh yes, I am called you know.

Q. Well, how much of your time is devoted to it?

A. I don't understand you.

Q. What portion of your time are you nursing?

A. Well, when I go I stay a week

Q. How many weeks in a year are you out nursing?

A. Oh about 4 or 5 months, sometimes, in a year.

Q. Would you say you go out as much as that, on an average?

A. Yes, in a year.

Q. And you say you nursed this lady about 18 years ago?

A. Yes, sir.

Q. As a monthly nurse?

A. Yes, sir.

Q. That is your occupation, is it not?

A. Not exactly, now it isn't.

Q. Do you take surgical cases?

A. Oh no.

Q Then your business in that line has been mainly what they call monthly nursing, has it not?

A. Yes sir.

Q. I suppose you mean "mid-wife"?

A. Yes sir.

Q. Do you do any kind of nursing beside mid-wife?

A. Sometimes I do.

Q. But that is your principal occupation?

A. Yes, sir,

Q. Who sent for you, after Mrs. Flannelly's injury?

A. What is that?

Q. How were you sent for—who came after you?

A. To Flannelly's you mean?

Q. Yes?

A. Mr. Flannelly came after me.

Q. When you got to the house you found Mrs. Flannelly in bed?

A. Yes, sir.

Q. And the symptoms of a probable mis-carriage had developed at that time, had they?

A. Not just when I got there.

Q. They hadn't?

A. No, sir.

Q. She was in a very nervous and hysterical condition, was she not?

A. Yes, sir, she was very.

Q. Did she not talk a great deal about her distress at the death of the Toohill boy?

A. No, she didn't.

Q. You didn't hear her talk of that at all?

A. Not then when I got there.

Q. During the time you were there?

A. Oh yes, during the time I was there.

Q. That had excited her a great deal had it not?

A. Yes, very much.

Q. The fact that he had been killed while in her care?

A. Yes, sir.

Q. What was the first treatment you gave her at any time?

A. Well I gave her some medicine, the first treatment.

Q. Is that all?

A. At that time.

Q. Well, for how long was it after you went there before you did anything else besides give her medicine?

A. Well, I just waited on her alone, that is all; I didn't do anything else, that is, house work.

Q. Nothing else but wait on her and give her medicine?

A. Yes, sir.

Q. All the time you were there, that is all you did?

A. Yes sir, all the time I was there.

Q. You say you understood she was not hit by the train?

A. Yes sir I understood she was not hit by the train.

Q. Who told you that?

MR. SHERWOOD.

I object to this as mere hearsay.

MR. TORREY.

Q. Who told you that Mrs. Thomas? Who told you that she was not hit by the train?

A. I knew that myself, that she wasn't hit by the train; if she was hit by the train, I don't think she would be here today.

Q. But you, yourself, don't know anything about any of her injuries, how they occurred—that is, you were not a witness to any of them?

A. Oh no, I was not.

Q. There was some doctor attending her at that time?

A. Yes sir.

Q. How many times did he come there while you were there?

A. Well now, I could not exactly tell you that.

Q. Well, give us your best recollection?

A. Well, he was there about three or four times while I was there.

Q. Doctor Pier?

A. Yes sir.

Q. He simply prescribed medicine and gave you directions as to how to administer the medicine, did he?

A. Yes, sir.

Q. How many kinds of medicine did he give her?

A. I gave her two kinds one time, and gave her three kinds another time—it was changed, you know.

Q. Who was taking care of the house there?

A. Why their daughters at the time.

Q. What?

A. Their daughters I say--they were taken from service, one of them was anyhow, to come home to the house.

Q. What was her name?

A. Her name is Lizzie—the oldest girl.

Q. How old were the other two?

A. Well now, I could not exactly tell you how old, the other two were younger than her; anyhow she is the oldest.

Q. Do you know where she had been out to service—Lizzie?

A. No, I could not tell you that.

Q. You have seen Mrs. Flannelly a number of times since, you say?

A Yes, a number of times, since.

Q. Where have you seen her?

A I have seen her to her own home, and she has been to my home, and came in a wagon or buggy.

Q. How many times has she been to your home?

A. About three times, to our place.

Q. Just for a call, or to stay for a time?

A. Yes, just for a call.

Q. Did she drive over herself?

A. Oh no, her little boy drove her over.

Q. This eleven year old boy?

A. Yes sir.

MRS. ALVA LYNN, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mrs. Lynn, where do you live?

A. West Pittston.

Q. You are a married lady?

A. Yes sir?

Q. Were you acquainted with Mrs. Flannelly prior to her injuries?

A. Yes sir.

Q. For how long have you known her?

A. Over three years.

Q. To what extent did you know her; that is, whether you knew her in her home, and about her home?

A. I boarded there; I was out in the country for my health, and I boarded there for three summers, almost all summer.

Q. For three summers before the accident, you boarded there?

A. Before the accident.

Q. Did you have any of your family boarding there also?

A. My three children and myself, and this little boy, the last summer—Howard Toohill, my nephew.

Q. What was the condition of this woman's health prior to the injuries received in this accident?

A. Well during the time I was there, she was constantly, almost for the three summers, she was the most active woman I have ever met, and I never met a woman—She was in perfect health, it seems, and I never heard her com-

plaining for an instant; I done the complaining, and she done the cheering. I wasn't in very good health, she was a very cheerful character, and a very hard working woman; worked on the farm, and in the house; mended the shoes, cut the men's hair, and done everything.

Q. What did you say about the shoes?

A Mended all the shoes that was worn; she had a regular cobbler's bench, I guess, and mended all the shoes for—I don't know, 9 children I think.

Q. What was the condition of the father?

MR. TORREY.

We object to that, if your honor please.

A. He was an invalid.

MR. SHERWOOD.

For the purpose of showing the extent of the value of her services to her husband who was an invalid, and she was forced to take his place, and do certain line of work, because of that fact.

MR. SHERWOOD.

We offer to show by the witness that she was there in the home which consisted of of the two plaintiffs, the husband and the wife, and their nine children then living, which were at home; that the husband was weakly and an invalid, and the wife what she did, and what she was forced to do by reason of that fact—all the different work that she did, and that this woman saw for the three summers she was there immediately prior to the same summer of this accident.

MR. TORREY.

We don't object at all to her saying what she did, but to her saying anything about the husband's condition for the purpose of exciting sympathy, without any material bearing on the case, we think is irrelevant and immaterial.

THE COURT.

Suppose the conditions were reversed, and the wife was suing for the loss of her husband's earnings, wouldn't it be relevant?

MR. TORREY.

The value of the wife's services to the husband I suppose is the purpose of the offer, but it seems to me those services are just as valuable to one, whatever his condition is.

THE COURT.

They are, if you were measuring it as you would measure the services of a working assistant, we will say; but considering what we sometimes speak of in the law as the consortery of husband and wife, wouldn't it come in there?

MR. TORREY.

It wouldn't strike me so, your honor, but of course I shall kneel to your honor's judgement.

THE COURT

It seems to me that it may be given as possibly explaining, and confirming, or corroborating the statement of what things she did, which were mentioned. I will allow the evidence.

MR. SHERWOOD.

Q. What was the condition of her husband's health?

A. She took me as a means to help support the family, after he became sick; when I got there, he had neuritis, I think—what I was told was a disease of the nerves; his toes turned backwards, and she had to feed him, and give him some kind of a bath every day and rub him all over with this liniment. If she was out of this stuff,—salve—she would go to Avoca at eight o'clock at night, and attended to him; —You can ask his physician, Dr. Pier, I believe he can tell you more than I can. Of course this work was forced on her; she worked on the farm.

Q. Tell us what she did?

A. I have seen her lead the horse, pulling the plow; I have seen her digging, hoeing, and doing everything. I have seen her get up at four o'clock in the morning; of course she had to do it in order to support the family; he couldn't; and cut the men's hair—did I say that?

Q. Yes, you said that?

A. Everything, I have never seen such a woman; it seemed impossible.

Q. How did her apparent health at least, compare, as compared with her apparent condition now?

A. Well, of course then, I didn't board there, after that she had to send away, she couldn't attend to me and all my family; and then I took a cottage about half a mile from there; I seen her the night of the accident also. I got a telephone message to come and take the children; I was in at the dentists that day, at West Pittston, and I used to go out with her; she used to drive in for me, besides other business we had, so then that night of course I went

out for the children, and I found her much different to what I left her the day before. Stayed in Pittston over night; and she was like a maniac; I seen the bruise on her head, but, not the bruises on her body until about three weeks afterwards, and, as I was about to say, I got a cottage about half a mile from there, and stayed the balance of the summer, until the first of October; and of course, seen her on an average of once a day from that time, and my, she is a changed woman in every way, both physically and every way I think. She is perfectly helpless.

12:30 adjourned to 2 p. m., same day.

Now, 2 p. m., Court reconvenes (same witness on stand).

MR. SHERWOOD (Continuing).

Q. I asked you at noon, if you saw her injuries, the color of them, and if you saw them again after the time that you say you first saw them?

A. I seen them for the first time about three weeks after, or a month, on the body, for the first time; only the lump on the head I saw the night of the accident when I went up for the children.

Q. Where was it you saw the injuries about a month afterward?

A. Down here, down her side here, and down here, her thigh and leg.

Q. And what was the condition then?

A. Sort of black and blue, you know how an injury is, and as if there was stagnated blood under the skin?

CROSS EXAMINATION.

MR. TORREY.

Q. You say you were boarding there at the time of the accident occurred?

A. Yes sir.

Q. You said you had three children of your own with you?

A. Yes.

Q. What were the ages of the children?

A. The boy was then two about—the youngest one, and four and five; and this little boy, my nephew.

Q. How many were there in their family—the Flannelly family?

A. I think nine children and Mr. and Mrs. Flannelly, eleven, and there were other boarders came while I was there.

Q. How large is the house?

A Well, about 8 rooms, or nine—I know I occupied the parlor as a bed-room when they were crowded.

Q. Did you say you had some other child besides your own?

A. My little nephew, who was killed, Howard Toohill.

Q. Are you a sister of Mrs. Toohill?

A. Of Mr. Toohill.

Q. How long had you been there—what time of the year did you go there?

A. I went in May, and I came back the first of June for about two weeks, and then I went about the 17th back again, and I stayed until the night of accident; the night I went down to take my children back, and I went out and rented a cottage, and

was out for the balance of the summer, until the first of October.

Q. You had been there then about six weeks before the accident?

A. Well—I know I was there in May, you know, until about the 8th or 10th of June, the Jubilee in West Pittston, and I went home to prepare for that, and after the Jubilee, I went out again.

Q. How long were you there, at home, at that time?

A. From about the 8th of June until about the 17th—It might have been the 7th. I could not just tell.

Q. You say you had been there before?

A. Oh yes, for the two summers before—this was the third summer.

Q. Now what time was it when Mrs. Flannelly was brought home that day?

A. I don't know about what time of day; I didn't arrive there you know until about seven o'clock in the evening, just dusk; I received a telephone message, I was at my brother's at the time, and they said I should go for the children, that Mrs. Flannelly would be unable to attend to them; the telephone message came from Dupont to me.

Q. Mrs. Flannelly was extremely excited and even hysterical over the death of your nephew, was she not?

A. I don't know that it was the death of my nephew exactly; I knew she was injured of course.

Q. Didn't she talk about that a good deal?

A. No; of course she said "Oh, poor little Howard"; that night she seemed to—of course her nervous system was upset, of course, and she was in great pain, and she felt her side and back; that night

she complained of her head, and of course everything in general.

Q. When did you first see the bruises on her head?

A. The night of the accident, just after I went in to see her, when I went for my children.

Q. Just what part of the head was that?

A. I could not say; you know it was dusky, but I felt it, I think on the left side, approaching the bed; yes, it would be on the left side, yes, right about here (indicating above the ear) on the left side though, I felt it with my right hand.

Q. How large a lump was it?

A. It wasn't a very large lump—it protruded, you; it wasn't this way large, it just stuck out.

Q. Then it wasn't as large as your hand?

A. Oh no, I don't think it really was, to feel it, you know—it was not as large as my hand.

Q. And the skin wasn't cut at all?

A. I don't know, you know it was dark, dusky.

Q. No appearance of blood about it at all?

A. I could not tell you, it might have been bleeding and dried.

Q. You didn't see any blood?

A. It was too dark, it was dusky.

Q. You didn't feel any?

A. That was late, the accident occurred around noon, and this was in the evening—it was well dried.

Q. I asked you if you felt any blood?

A. I said no, I didn't see any, it was too dark.

Q. Now, you say that you didn t examine her side at all?

A. Oh no, I didn't examine her side.

Q. You didn't see it—she was in bed?

A. She was in bed, yes sir.

Q When you got home?

A. When I got back?

Q. It was three weeks or a month after that before you saw any bruise on her side?

A. About a week after that—she was in bed still.

Q. You didn't see it then?

A. No, not until about a month after.

Q. What did you say you saw then?

A. To me it was black and blue you know, or it might be stagnated blood, or like a bruise, a bad severe bruise.

Q. And that is all you could see of it?

A. That is all I saw of it at that time.

Q. There was no appearance of any cut or anything of that kind?

A. Really she didn't have a chance, she was just showing me when one of the boys entered, and we heard them coming, and didn't have a chance; I just seen at a glance, it was black and blue.

(Question repeated by the stenographer at the request of the counsel)

A I could not say—not to my eye. The first night, it was dark, I could not see; and I could not say whether there was or not.

Q. On which side was that?

A. The left side.

Q. And you say it extended all down her leg?

A. Yes sir, about this far.

Q. About half way down to the knee?

A. It might have been further, I didn't get a very good look, you know, just a glance.

Q You didn't see above the hip at all?

A. No, not above the waist line.

JULIET TOOHILL, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Miss Toohill—Are you a Miss or Mrs?

A. Miss-

Q. Where do you live?

A. Pittston.

Q. You didn't see the accident?

A. No, sir I didn't.

Q. And I suppose what you know is regarding Mrs. Flannelly—were you acquainted with Mrs. Flannelly, before the accident?

A. Yes, sir.

Q. How long had you known her?

A. About three years.

Q. How did you come to know her?

A. After my sister went out there boarding, I went out to see her.

Q. Did you ever board at her house?

A. No, sir.

Q. Was that Mrs. Lynn, who was on the stand?

A. Yes sir.

Q. For how long a time, at once, would you visit at the Flannelly home?

A. Well not more than two days.

Q. Did you ever see Mrs. Flannelly elsewhere than on those occasions?

A. Yes, she has been to our house.

Q. Did you have a knowledge of her appearance, her apparent health before the injury?

A. Yes sir.

Q. What was her apparent condition of health prior to the injury?

A. Why she was in good health.

Q. When did you first see her, if you recollect, following the accident?

A. The day after.

Q. Where?

A. At her home.

Q. Where was she, at her home?

A. In bed.

Q. Kindly explain her condition, her apparent condition at least?

A. She was very weak, and she had lost her speech, and I saw the bruises on her head and her side —she was nervous, very nervous.

Q. Will you describe that bruise on her head, as you saw it—which side of the head was it on?

A. It was on the left side.

Q. About what location?

A. About there I think.

Q. That is immediately over the ear?

A. Yes sir, it was swollen, very swollen.

Q. How much would it project from the natural contour and shape of the head?

A. Well I guess may be an inch, if not more.

Q. An inch or more?

A. I think so.

Q. Right over the ear?

A. Yes sir.

Q. How large a spot appeared to be bruised— —well, we will say swollen—how large a part was swollen?

A. About the size of your hand, I guess, as far as I know

Q. Did you observe whether the skin was cut or not?

A. No, I didn't notice that.

Q. You didn't notice any cut?

A. No, I didn't see any cut.

Q. You spoke of seeing her side, was that the same day that you saw her side?

A. Yes, sir.

Q. Did you see her full side;

A. Yes, sir.

Q. Body stripped—what was the condition of the side?

A. Why black and blue—that—there was a spot on the side that was a sort purple or red—it was very sore looking.

Q. How far down did the bruise extend?

A. Almost to her knee.

Q. Did you observe around on her back?

A? No, I did't—no I didn't notice her back, just on the side.

Q. She was in bed—did she roll over?

A. No, sir.

Q. How was she lying?

A. I think she was kinder lying on her right side.

Q. Was she rolled around, over, so that you could see?

A. No, I just lifted the clothes.

Q. And saw that much—what was her appearance at that time as to suffering?

A. Well she seemed to be suffering terribly.

Q. I mean, how did she communicate that to you?

A. Why from moaning, and different moanings.

Q. How many times during the interval that has elapsed between the day of the accident, and the present, do you suppose you have seen Mrs. Flannelly?

A. Well when my sister went out there, she

had a cottage out there, and I stayed out there with her all the time until I think about the 10th or 11th of September.

Q. That is following the time of the accident?

A. Yes, that was about two weeks after the accident.

Q. Would you call at the house occasionally?

A. Once, if not more, in a day.

Q. What was her condition during all that time?

A. Well, she suffered all the time.

Q. Where was she?

A. She was in bed for, I think until about the middle of—later than the middle of August I think that was the first time I saw her up.

Q. Sitting up?

A. Yes, first.

Q. Now, after you returned home from your cottage, have you seen her occasionally off and on down to the present time?

A. Yes sir.

Q. What has been her apparent condition since that time?

A Well, just about the same as when I saw her last out at Lynns; I think she is thinner than she was, a great deal.

Q. Have you noticed her face as to whether it is, as a rule, pale, or not?

A. Yes sir.

Q. Do you know about what work she did before she was injured?—I think we have gone into that, perhaps enough. We will pass that. How does she compare now, in her general physical appearance with her condition before the injury?

A. I don't think there is any comparison—she is different altogether.

Q. Favorably or unfavorably?

A. No, unfavorably.

CROSS EXAMINATION

MR. TORREY.

Q. You say you saw her the night of the accident, or the day after?

A. No, sir, the next day after.

Q. Where were you living then?

A. Pittston.

Q. Where did you live after that, how far from her?

A. Why about two weeks after that I stayed out there, not at her house, but at a cottage.

Q. How far from her house?

A. About twenty minutes walk: fifteen or twenty minutes walk.

Q. You stayed there until some time in September, you say?

A. Until about the 10th of September.

Q. This bruise that you saw, was along the side of her leg and on her hip, was it?

A. Yes, sir, it was black and blue, and on her side there was another bruise.

RE-DIRECT EXAMINATION.

MR. SHERWOOD.

Q. What part of her side did you say there was another bruise?

A. Right here (indicating).

Q. About over the ovaries?

A. Yes sir.

MRS. NORA GANNON, sworn for plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mrs. Gannon, where do you live?

A. Dunmore.

Q. That is in connection with the city of Scranton?

A. Yes, sir.

Q. Do you know Mrs. Flannelly?

A. Yes, sir.

Q. How long have you known her?

A. For 28 years.

Q. Known her well?

A. Yes sir.

Q. Did you ever live near by her?

A. Yes sir.

Q. What was the condition of her health prior to this injury?

A. She was perfectly strong and healthy, and able to continue her work every day since I have knowed her.

Q. I don't know how closely you knew her, but, if you know, what work she did, I would like to have you indicate in a few words?

A. She performed all the work of the family, and she certainly did hustle the work, and sewing, and everything, and when she moved out on the farm, after her husband took sick, she done all that work also, and her children went to school, those little girls, and one worked out, and then, of course, I didn't visit them very often, because I had a big family of my own to attend to, but she performed the work every time when I was out there, she was around about it.

Q. Then I gather from what you say—I don't know about it myself—that some time ago they didn't live out there?

A. Yes, sir.

Q. Where did they live?

A. Taylorville.

Q. And you knew them there?

A. Yes, I knew her before she was married.

Q. What opportunity have you had of observing her condition since the accident and injury?

A. Well I find by the looks of her she is a great deal different woman from what she was when I used to dress-make for her.

Q. You were her dress-maker?

A. Yes; and she is altogether out of shape, and I certainly would have to make a dress now to fit her, I wouldn't make her to fit the dress.

Q. Have you been at her home at any time since the accident?

A. Once.

Q. When?

A. About one week I think after she was hurt.

Q. How did you find her?

A. I found her lying in bed, very weak, and she wanted to talk to me, and I knowed it would distress her and I told her to keep still, because I didn't want to make her feel bad, and make her cry, because I was crying myself.

Q. Have you seen her since?

A. Only once.

Q. How long ago?

A. Only since this here, just about the day before yesterday.

Q. How does she at present compare in weight

with her condition as you know it just prior to the accident?

A. Well I think she was reduced over thirty pounds; she looks very poor and miserable to me now.

Q. You spoke about the change in her shape?

A. Yes.

Q. And having to make a dress to fit her now. What change do you observe in her shape?

A. I notice her neck is all out of shape, and her shoulder, and her body; she goes altogether different from what she did before the accident, when I saw her.

Q. What kind of a figure had she, prior to the injury?

A. Well, she had a perfect figure.

Q. Were you acquainted with her line of work, and the industries which she performed prior to the accident?

A. Yes sir.

Q. I think you spoke of that before, did you not?

A. Yes, she performed all the household duties.

CROSS EXAMINATION

MR. WILL TORREY.

Q. When was it you did this dress-making for for her, you speak of?

A. I have dress-made for her, for—say from the time she was married; I don't just remember what year it was in, until 12 years ago, and then I went out there and I stayed there three days, and I made her a dress too; It wasn't because she asked me to, I made it.

Q. When was it?

A. It was as late as two years—when her husband was sick in bed, two years on the 19th of last March when I was out there - that is the last time I made anything for her.

Q. That is the last time you were there?

A. Oh no, it wasn't the last time I was there.

Q. That was the last time you were there before the injury?

A. Oh no, I was there after that, but I didn't do anything; I just went on the late train that goes out there late in the afternoon.

Q. When was that?

A. It was in the spring, I know it was; the snow was gone off the ground, and it was, I should think about in May.

Q. When you went there about one week after this accident, when you say you found her in bed, was she nervous and excitable?

A. Well, she wanted to tell me about her condition, and I says "Mary, don't, I don't want to hear it" because I knew it would make her feel bad.

Q. She was nervous?

A. Yes, she was nervous and very weak.

Q. Did she talk about this Toohill boy?

A. No, I didn't want to hear it, for I knew all about it.

Q. You considered her rather hysterical and nervous?

A. Yes, I considered her very weak.

MRS. SUSAN THOMAS, Recalled for Re-Direct Examination.

MR. SHERWOOD.

Q. Mrs. Thomas, on cross examination, in response to Mr. Torrey, I think it was in response to a

question by him, you mentioned the fact that you treated Mrs. Flannelly, or cared for Mrs. Flannelly, some eighteen years ago?

A. Yes sir.

Q. What was the trouble?

MR. TORREY.

We object to the question—we don't think it is material.

MR. SHERWOOD.

The purpose is to show it was a confinement case.

THE COURT:

You may show that.

MR. SHERWOOD.

Q What was the trouble with her at that time?

A. A confinement case; but she was in very good health at that time.

MISS LIZZIE FLANNELLY, Sworn for Plaintiff

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Miss Flannelly, you are a daughter of the plaintiffs?

A. Yes sir

Q. How old are you?

A. Twenty years old.

Q. Do you remember the time that your mother was injured?

A. Yes sir.

Q Were you at home that day?

A. Yes, sir.

Q. Where were you working before she was injured?

A. That time

Q. Not just at the time?

A. I wasn't working any place; I worked just before that.

Q. What time was she brought home?

A. I should say about half past six in the evening.

Q. What was her apparent condition, when she was brought in?

A. She was in very poor condition, very weak.

Q. Very weak?

A. Yes, sir.

Q. Make it as short as you can, but give it without my having to ask you?

A. Very excited.

Q. How did she indicate that excitedness?

A. She was moaning, and she was all going, nervous -very nervous.

Q Was she conscious; did she know people?

A. No, sir.

Q. Well, you put her to bed, did you?

A. Yes sir.

Q. Can you give us something near how long she remained in bed before she got up?

A. She remained in bed from the 30th day of July to the middle part of September.

Q. Do you mean that she didn't sit up any during that time?

A. No, sir.

Q Then, after the middle of September, how soon did she begin to get out of doors?

A. Well she was in the house for over a week, after she got up out of bed, then she used to, but very little, sit around outside in the chair.

Q. Since that time has she been able to be up all the time?

A. No, sir.

Q. Just explain that?

A. Well, there is a great many times she don't get up at all in the day.

Q. What else?

A. And different times she gets up a little in the morning and goes back to bed again.

Q. What is the condition of her appetite?

A. She has no appetite at all, eats a very little.

Q. How does she rest?

A. She rests very poorly; she doesn't sleep while she is in bed.

Q. Can she take care of herself?

A. No, sir.

Q. Dress herself?

A. She can put her clothes on around the house a little, but when she is going any place, the tidying up, she cannot at all.

Q. How about washing and bathing her person?

A. No, sir, she cannot.

Q. What care does she have to have in that respect?

A. I have to wash her and comb her hair and dress her.

Q. What appearance of suffering did you notice in your mother?

A. I notice she is very weak around the house, that I noticed, different times—She seems very queer.

Q. What do you mean by "Queer"?

A. I mean she don't act like she always did.

Q. You mean mentally she doesn't act right?

A. She doesn't realize—she doesn't act like she always did act—she acts very queer.

Q. I wonder if you mean that her mind doesn't seem right?

A. Yes sir, in her mind.

Q. This condition of the neck that your mother has, have you observed whether that remains about the same, or draws itself more?

A. Well, it is drawn down much more than it has been before—it is drawn down more.

Q. It seems progressive?

A. Yes sir.

MR. TORREY.

I object to that question.

THE COURT.

Yes.

MR. SHERWOOD.

Strike out the answer, I am willing to have the answer stricken out.

Q. Does she ever complain of pain anywhere, if so, explain that?

A. Yes sir; I always hear her saying she has a pain right here—the side of her stomach.

Q. How is her head?

A. She always has a pain around here by her neck, right here (indicating).

Q. Right here?

A. Yes, sir.

Q. Has she been able to do any of her work since she was injured?

A. No sir—the likes of mending, she does very little; anything else, she doesn't do.

Q. How about the control of the movements of her hands—have you noticed anything in regard to that?

A. No, sir.

Q. Describe the bruises you saw upon her side

—I am not sure that you mentioned bruises on her side?

A. I never mentioned them but I saw them. I saw a very large bruise right here, on her side.

Q. Now you are putting your hand pretty well around toward the spine?

A. Yes sir. And all down this side was bruised.

Q. That is on the back of the side of the hip?

A. Yes.

Q. And clear down—

A. To the knee.

Q. Over the back of the thigh?

A. Yes, sir.

Q. How was it to the front, or the region of the ovary?

A. She was bruised very much right here—very much.

Q What about that bruise on her head?

A. There was a very large bruise on her head, it was all swollen, very much.

Q. I wish you would be careful now—you saw it several times, didn't you?

A. Yes sir.

Q. I wish you would tell the jury, pretty accurately, how far that extended?

A. Just about here (indicating)

Q. What would be the size of it?

A. It was very large,—very large, well I should say as large as the palm of my hand is.

Q. Do you refer to the swollen bunch?

A. There was a big place that wasn't swollen, that was bruised.

Q. When you are speaking of the bruise that was as large as the palm of your hand,—

A. That was swollen.

Q. Where was the spot which you say was bruised and not so much swollen, locate it with reference to the spot you have indicated as being swollen?

A. Right about here (indicating back of the left ear)

CROSS EXAMINATION.

MR. TORREY.

Q. You say you were living at home at the time of the accident?

A. Yes sir.

Q. How long had you been there?

A. I had been home then for about four months before—three or four months before that.

Q. Then you have been living at home ever since?

A. Yes sir.

Q. Are you the oldest child?

A. The oldest girl.

Q. There is a son older?

A. Two brothers older.

Q. You said your age was twenty?

A. Yes, sir.

Q. Now, you have been living at home, I think you said, ever since then?

A. Yes, sir.

Q. What is the age of your next oldest sister?

A. Younger you mean?

Q. Yes?

A. She is going for 16 years old.

Q. And the sister, next, how old is she?

A. She is going for fourteen years old.

Q. What part of the duties of the household were you performing before your mother was hurt?

A. Well I always helped with the house work.

Q. All sorts of house work?

A. I helped with some of it; what I had to do, I done.

Q. When your mother got home that night, or that afternoon, did you see her when she first came in?

A. I saw her when she first came in that night.

Q. Who came with her?

A. My father.

Q. She walked into the house didn't she?

A. No sir, we helped her in.

Q. She went in on her feet?

A. She was trying to help herself with her feet, but she couldn't—we helped her in.

Q. She was very much excited and nervous was she not?

A. She was very nervous and excited.

Q. When did you examine these bruises you speak of?

A. The next morning.

Q. You didn't examine them any that night?

A. I did all that I could do to keep her down, and try to pacify her.

Q. She was hysterical was she?

A. Very much.

Q. Now, when did you examine the bruises, was that before or after the doctor came?

A. I think it was after the doctor came. He came in the morning, early.

Q. And your mother was in bed?

A. Yes sir.

Q. You say there was a bruised spot on her back?

A Yes, right around here. (indicating)

Q. And another one in front of the abdomen?

A. Yes, right here. (indicating)

Q. In front of the hip bone?

A. Yes.

Q. And all the way down her leg?

A. Yes, sir, all the way down here.

Q. Did your mother attempt to explain to you how she got the bruises?

A. No, sir, not at that time.

Q. Well, has she since?

A. Why, she never explained to me how she got them, no more than the accident.

Q. And nobody else has ever explained it to you, have they?

A. No, sir.

Q. There was no cut on the body or the head either, was there?

A. I didn't see any cut, no, sir.

Q. You didn't see any evidences of blood at all did you.

A. No blood outside; only bruises, bruised blood.

Q. Her clothing wasn't torn?

A. No, sir.

Q. When did you first observe anything like a twist in her neck?

A. I noticed it a few days after, when I could notice that her neck was kinder bent a little at the time.

Q. It didn't show itself conspicuously for a good while, did it.

A. It was growing more.

Q. When did you first come to notice it at all?

A. It was about three days after.

Q. And how long would you say the bruises were evident—were visible—How long did they continue to be visible?

A. I just could not tell you how long, but I know it was quite a little while.

Q. A week or so?

A. Yes.

Q. Not more than that, was it?

A. It seemed more than that.

Q. Now you say that your mother requires a great deal of attention in washing, and that sort of thing?

A. Yes, sir.

Q. Why is it she cannot do it for herself?

A. Because she isn't able to.

Q. Why?

A. Why, I don't think she looks able to do it.

Q. Is it because of weakness or because of some other trouble?

A. Yes, she is weak—very weak.

Q. And that is the only reason, is it?

A. She cannot help herself very much on one side.

Q. On what side?

A. On her left side.

Q Do you mean she cannot use her arm?

A. She can use it a little, but not like she used to.

Q. Cannot she use it as well as she can the other one?

A. No sir, not as well.

Q. To what extent can she use her left arm?

A. She can use it a little, yes.

Q. She can raise it above her head?

A. Yes.

Q. And she has all the movements of it, hasn't she?

A. As far as I know she has.

Q. There were no bruises or wounds or anything on her arm, or anywhere?

A. No, sir I didn't see any.

Q. Then the only reason you can assign for her inability to do everything for herself in dressing, would be weakness is it?

A. Yes sir, she is very weak.

Q. Where is she stopping now?

A. Stopping home.

Q. I mean here, in town?

A. With her sister.

Q. Where is that?

A. In Hyde Park.

Q She walks down to the car?

A. I don't know about that—I don't go with her—My father went with her.

Q. You haven't been with her outside the court house?

A. No, sir.

Q. Haven't you seen her on the streets at any time since you have been here in town?

A. Yes, sir, out at the corner.

Q. So far as you know, she walks back and forth to the car?

A. Yes sir?

MRS. HUGH FLANNELLY, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mrs. Flannelly, how long before the accident, did you know Mrs. Flannelly the plaintiff?

A. Six years.

Q. What was the condition of her health immediately prior to the accident?

A. She was a perfect healthy woman.

Q. When did you see her first, after the accident?

A. That evening.

Q. Where?

A. At her home.

Q. What was her condition when she was brought in?

A. She was in a very, very bad condition when I seen her; it was 8 o'clock that evening when I got there. I spoke to the woman and she didn't know me; she didn't realize who I was until around 12 o'clock.

Q. 12 o'clock, you say?

A. 12 o'clock that night, yes, sir.

Q. For how long, following being brought home, was she in bed?

A. I could not tell you how long she was in bed, but I know I stayed there until 5 o'clock that morning, and she had lost her speech at 12 o'clock at night, and hadn't gained it at 5 o'clock that morning when I left there.

Q Then did you go home?

A. Yes sir.

Q. When did you next see her?

A. On Sunday.

Q. The Sunday following?

A. Yes sir.

Q. Do you recollect what day of the week this was?

A. On Tuesday the 30th of July I seen her first.

Q. And you saw her the Sunday following?

A. Yes sir.

Q. How was she then?

A. She wasn't any better than when I left that night; seemed they had to keep the children away over in the yard away from her; there wasn't anybody could walk across the floor.

Q. What evidence was there of pain and suffering?

A. She suffered a great deal; she complained of her head all the time, and her side.

Q. Was there any of this drawn or bent condition of her neck or body before the accident?

A. No, sir.

Q. What figure had she before that?

A. A perfect figure.

Q. Do you know whether her neck in that condition remains about the same, or does it bend further over?

A. It is bent now, it never was bent before; it was as straight as anybody else's would be.

Q. What I am asking about is if it was bent at the accident, or growing?

A. It is growing worse all along.

Q. Can the crookedness of the spine be seen?

A. Why certainly.

Q. It shows upon her person, if her neck is bared?

A. Yes sir.

Q. How does she compare with what her weight was immediately prior to the accident?

A. I should judge she must have lost about 10 or 20 pounds

Q. Does she seem to be at a standstill weight, or is there a change?

A. She is getting thinner all along, as far as I can see.

Q. What have you observed from time to time as to her strength or weakness—I don't mean in comparison with what it was shortly after the accident, but we will say does she seem to be getting well of any of these conditions?

A. No sir, she is getting worse, right along, as far as I can see of the woman.

Q. What work has she been able to do since the accident?

A. Not any as I know of—I have been there a couple of times.

Q. How about caring for herself?

A. She cannot care for herself at all.

Q. Do you know about baths, or combing hair, and such things?

A. I noticed her daughter comb her hair and wash her, and put on her shoes and stockings for her.

Q. How abou' before the accident?

A. She could do it all herself, and wait on anybody.

CROSS EXAMINATION

MR. WILL TORREY:

Q. Are you related to the plaintiff?

A. Yes.

Q. What is the relationship?

A. She is my mother-in-law.

Q. Where do you live?

A. West Avoca.

Q. How far is that from where the Flannelly's live?

A. Not so very far.

Q. About how many miles?

A. I cannot tell you just how far it is.

Q. Five miles?

A. Oh no, I should not think it is much more than a mile.

Q. How often have you visited the house of Mrs. Flannelly?

A. I have been there I guess two or three times a month since she got hurted.

Q. You say you saw her the night of the accident?

A. Yes.

Q. How did you happen to go over there that night?

A. Why the word came to me at 12 o'clock that my mother in law was killed.

Q. And you went over to the house?

A. Yes sir.

Q. What time did you arrive there?

A. I got there at 7 o'clock in the evening—she had just been taken home.

Q. You say she was very nervous and excited?

A. Yes sir, she acted like a woman that lost her mind; didn't know who I was until 12 o'clock.

Q. You tried to control her?

A. Yes, we tried to.

Q. You say she lost her speech?

A. Yes at 12 o'clock.

Q. And wasn't able to talk at all?

A. She hadn't spoke at all at 5 o'clock when I left in the morning.

Q. And you came back on the next Sunday?

A. Yes sir.

Q. And you found her no better?

A. No, sir, only worse.

Q. And she was nervous and excitable, and had to be restrained in bed?

A. Yes sir; had to take the children into the other yard away from her—no one could cross the floor, from the pain she had in her head.

Q. Do I understand you to say she tried to walk across the floor that day?

A. No, sir, had to take the children away, so they wouldn't walk across the floor.

Q. Because she was so nervous?

A. Yes sir.

Q. When did you first notice the bend in her neck?

A. That Sunday when I went up

Q. The Sunday following the accident?

A. Yes sir.

Q. How much of a bend was it at that time?

A. There was quite a little.

Q. As much as there is now?

A. No sir, it is much worse now.

Q. She was in bed then when you noticed her bend, first?

A. Yes sir.

Q. When did you first notice that her spine was crooked?

A. The next time I went out, after being up on Sunday, I guess it must have been three weeks afterward.

Q. Was your attention called to it at that time?

A. She was trying to step on the chair, and I

seen she was turned; that is the first I noticed of her spine.

Q. You say she is no better now?

A. No, sir, she is much worse.

Q. Do you think she is worse today than she was at that time?

A. Yes sir.

Q. Was she able to walk around the house the last time you were up, before you came in court?

A. A very little.

Q. Is she able to walk around more now than she was then?

A. I suppose she is.

Q. In what respect is she getting worse—she is not as nervous as she was?

A. She is nervous; she has not got her own mind at times.

Q. Do you think her mind is worse now than it was before?

A. Yes sir.

Q. Do you think she is more hysterical now than she was?

A. Yes sir.

Q. You don't have to restrain her now do you, and try to calm her down all the time?

A. No, sir.

Q You said you had to do that before, when you first knew her?

A. Not when I first knew her—after she was hurted.

Q. When did you marry the son?

A. The 14th of October.

Q. 1907?

A. 1903; I was married five years the 14th of last October.

Q. Which son is that?
A. Her step-son.
Q. Her step-son?
A. Yes sir.
Q. What is his name?
A. Hugh Flannelly.

MRS. KATE FLEITZ, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mrs. Fleitz, you live in the town of Dupont?
A. Dupont, yes, sir.
Q. Sometimes called Smithville?
A. Yes sir.
Q. That is facing the crossing where the accident happened?
A. Yes sir.
Q. Next house to Mrs. Aherns?
A. Yes sir.
Q. It was to your house, I believe, that Mrs. Flannelly was brought, after the accident?
A. Yes, sir.
Q. As I understand you didn't see the accident?
A. No, not altogether, not until it was all over; I seen them backing the train down and picking up the child that was all.
Q. You mean the passenger train?
A. Yes sir
Q. Was the passenger train backing down?
A. Yes, sir. And came to a stop near the crossing where it had struck the child at the crossing, and passed by a little way before it stopped, and then came back and picked the child up.
Q. You didn't see the accident anyway?

A. No, sir.

Q. Did you see Mrs. Flannelly over at the crossing?

A. Yes, sir.

Q. What was her appearance and condition there?

A. Well, she was hollering and screaming and pulling her hair and carrying on.

Q. Well, was she on the gound?

A. Yes sir.

Q. How long after the accident, before she was brought to your residence?

A. Well, I should say about maybe an hour or so after.

Q. Do you know how she got over there?

A. No, sir, I don't know how.

Q. How did she act in your residence?

A Well, she was hollering and carrying on just pretty near the same as she was at the crossing—she was hollering "Howard," that is the boy that was killed.

Q. Did you see any injuries upon her person?

A. No, sir, I didn't.

Q. Was she sitting up, in your house, or lying down?

A. She was sitting up, and laid down on the couch a while, and she was up and down, then hollering and screaming, and pulling her hair, and carrying on.

Q. For how long did that continue?

A. While she was to my house, I should say three or four hours; she was carrying on that way pretty much all the time.

Q. Did you know the lady before she was injured?

A. Yes sir, I had for a number of years, I could not say exactly how many years.

Q. What was the apparent state of her health at and prior to the injury?

A. Her health was good; it is not near as good now I don't think, by her appearance.

Q. Have you seen her often since the injury?

A. Yes, quite often, I could not tell how many times, but I have seen her quite often since the accident.

Q. What has been her apparent condition since that time?

A. Very poor to what it was before she got struck.

Q. Were you at her home at any time while she was in bed?

A. No, sir, not while she was sick.

Q. Have you been at her home at times since?

A. Yes, sir, I was there once or twice since, but then she was able to be up and around.

CROSS EXAMINATION.

MR. TORREY.

Q. I didn't hear the first part of your testimony—I understand you did not see anything of the accident?

A. You will have to speak a little louder.

Q. What was the first you knew or saw of the accident?

A. I was in the house and looked out and seen the people running over toward the crossing, and I went over and just got there in time to see the train passing back to pick up the child that was dead, and I just got there as they were picking him up, and putting him in the car

Q. It is quite a distance from your house over there.

A. Sir?

Q. You went over pretty rapidly, did you?

A. Yes, sir.

Q. Your house is right next to Mrs. Aherns?

A. Yes, sir.

Q. And there are some trees there between your house and the railroad, aren't there?

A. Well that I could not say.

Q. Some trees between your house and Mrs. Aherns house, and the railroad?

A. Yes—well that I could not say.

Q. You cannot see the railroad very plainly from your house, on account of the trees?

A. Yes, quite plain, see the crossing.

Q. There are some trees between, are there not?

A. I cannot say, I don't remember; there might be a few, but you can see the crossing quite plain.

Q. Where was Mrs. Flannelly standing, was she on the tracks or off the tracks?

A. She was on this side of the railroad towards my house.

Q. There was nobody helping her up, was there?

A. No, sir she was just going back and forth hollering and screaming.

Q. In an excited way?

A. Yes sir.

Q. Throwing her arms around?

A. Yes, excited.

Q. The horse was over on the other side, was he not?

A. Yes sir, on the other side of the crossing.

Q. Was he hitched to a telegraph pole?

A. I didn't take much notice of the horse.

Q. You didn't notice any bruises you say on Mrs. Flannelly at that time?

A. No, sir, I didn't see any.

Q. Did she complain of any, to you?

A. Yes, she complained of getting hurted on the side, but I didn't see any bruises.

Q. At that time?

A. No, sir.

Q. Her clothing wasn't torn at all, were they?

A. They were not altogether torn, but they were kinder ruffled up you know, her shirt waist.

Q. She was greatly excited over the fact that this little boy had been killed was she not?

A. Well that is true, I suppose, with her own.

Q. Didn't she mention that several times?

A. Yes, she was hollering "Howard, Howard" that is the child's name.

Q Didn't she say something like this "I never dare to see the Toohills again" or something like that?

A. No. sir I didn't hear that.

Q. You didn't hear that?

A. No, sir.

Q. How long had she been in your house when the husband came?

A. Since the accident?

Q. How long had she been at your house when her husband got there?

A. I should say she might be there about two hours, or somewhere around there, I could not say just exactly.

Q. When did you first see her again after she left your house—how long after, was it?

A. Well that I could not say.

Q. Well, give us your best recollection—was it a month?

A. I could not say exactly, it might be two months; I didn't see her for a long time, I could not tell you exactly.

Q. When you did see her, she was up and about the house, was she not?

A. Yes sir, when I went out.

Q. How many times have you seen her since?

A. Quite a number of times.

Q. Has she ever been to your house?

A. Yes.

Q. How many times?

A. I could not tell you exactly how many times.

Q. Since the accident?

A. Quite often, since.

Q. How did she come there?

A. Come in a carriage sometimes.

Q. Did she ever come any other way, except by carriage?

A. I never asked her how she came—She may have come on the car and got off at my house.

Q. Does the car run by your house?

A. Yes, quite close.

Q. But the car dosn't run near your house, does it?

A. Oh no.

Q. How long has she visited you, when she has been at your house?

A. She might stay an hour or an hour and a half.

Q. Did she ever come alone?

A. Sometimes.

Q. How many times has she been there alone?

A. That I could not say.

RE-DIRECT EXAMINATION.

MR. SHERWOOD.

Q. I did not understand from your examination that Mrs. Flannelly, when you went over the crossing, was standing up and moving around, I want to know which is right now?

MR. TORREY.

I object to the question.

A. I am hard of hearing, you will have to come closer to me.

MR. SHERWOOD.

Q. When you got over there, was Mrs. Flannelly standing—what was her position?

A. Well, she was on the ground, but she was carrying on.

THE COURT:

Q. When you say "on the ground" what do you mean, lying down on the ground?

A. Oh no.

Q. She was standing up?

A Of course she might have been before I got there; she was standing up when I got there.

MRS. JOHN McANDREWS, sworn for plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mrs. McAndrew, where do you live?

A. In Avoca.

Q. How long have you known Mrs. Flannelly?

A. About seven years.

Q. What was the condition of her health prior to this injury?

A. Well, it was very good health—very straight, very good.

Q. When did you first see her following the injury?

A. Well, I should think it was about five or six weeks after.

Q. Where did you then see her?

A. We went out to see her at her home.

Q. When you say "we went out to see her" who do you mean?

A. Well, my husband and I-

Q. Where was she at that time?

A. She was lying in bed.

Q. What was her apparent condition at that time?

A. Well, she was just complaining of her left side, all the way down.

Q. Did you see her side?

A. No, sir, I haven't seen her side.

Q. How does her general appearance now compare with her appearance before she was hurt?

A. Oh, there is a big difference in it now.

Q. In what way?

A. Well, crooked, and crooked ways, and crooked side, and crooked neck.

Q. How often have you seen her since the injury?

A Well, I have seen her a few times.

Q. Does the condition that she is in seem to stand still?

A. No, sir. It seems to be getting worse.

NO CROSS EXAMINATION

JOHN McANDREW, called (not sworn).

THE COURT.

I think we will have to limit you on this cumulative testimony.

MRS. JENNIE HUMPHREY, sworn for Plaintiff.

DIRECT EXAMINATION

MR. SHERWOOD.

Q. Mrs. Humphrey, where do you live?

A. In Pittston.

Q. How long have you known Mrs. Flannelly?

A. The day of the accident was the first time I saw her.

Q. After the accident?

A. Yes, after the accident.

Q. Where?

A. At Mrs. Fleitz', next door to my sisters.

Q. About what time of the day?

A. Oh it was shortly after the accident, I could not tell you exactly what time it was.

Q. Until what time of day did you see her?

A. It must have been after 2 o'clock I seould think.

Q. An hour, or two hours, or how long?

A. I could not tell you.

Q What was her apparent condition at that time?

A. She was not very—Well I could not tell you what condition she was in, but she was nervous and pulling her hair and hollering and like a woman very much excited, and you would think she had really lost her mind; I don't think the woman was in her right mind—I think her mind was gone; she was frightened, and being thrown like that of course—she had her hands up, pulling her hair when I saw her.

Q. How long did that continue?

A. Well, I didn't see her very long, I went away.

Q. Was it all the time you were there?

A. All the time I was looking at her, she was carrying on.

Q Were you over at the crossing?

A. No, sir.

CROSS EXAMINATION

MR. TORREY.

Q. How long were you there, at Mrs. Fleitz?

Q. I was there just a few minutes, the woman was very nervous and I didn't think it wise for a good many people to be there.

Q. How many people were there?

A. I don't know how many people.

Q. Were there any?

A. Yes.

Q. And did you hear her say anything?

A. Well, I don't know, she might have said something, but I could not remember, I didn't take enough of interest.

Q. Was she moving about?

A. No, I couldn't tell what position she had her hands up, like, this, and was pulling her hair, and moving herself as if she was in pain: her head and side, and up here, her hands down here, and then putting them up, and moving herself back and forth.

Q. You put your head over to the left?

A. Whichever side it was—she was moving her head as if she had pain.

Q. Did you see any wounds on her, yourself?

A. No sir, I didn't take notice of any wounds.

Q. Did you see whether her clothes were torn?

A. I dion't take notice—they were very much soiled.

Q. Did you hear her say anything?

A. Not that I can remember.

THE COURT.

A good deal of this is repitition, you will have to shorten it up.

MRS. MARY FLANNELLY recalled.

RE DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mrs. Flannelly, I desire to ask you whether you had hired help to assist you with your work, before you were injured?

A. No, sir, had no reason to.

Q. You answered Mr. Torrey, at one point in your evidence, that you didn't mean that you could see down from another crossing 1500 feet, at the time you approached—?

A. If anything would be in my sight.

Q. There is no question asked—

MR. TORREY.

I object, and move to have the answer stricken out, your honor.

MR. SHERWOOD.

I desire to ask her what she meant by that statement.

MR. TORREY.

I object to it, your honor.

THE COURT.

I shall have to allow it to stand.

MR. SHERWOOD.

Q. You spoke of striking your horse with a whip, was that before or after you saw the coming passenger train?

A. Before I saw the passenger train I hit my horse; he had become—his ears were up and he commenced to prance, and I hit the horse with the whip; and I hit the third time when I saw the train pull out of this steam and cloud of smoke, and just as we got on the edge of the track the train struck us.

Q. When you first hit him, was it before, or after you saw the train?

A. The first time I hit her was before I saw the train

MR. SHERWOOD.

There was some confusion, your honor, when we started out, about which was up and which was down, and I have talked with the witnesses and understand that up is toward Scranton, and down toward Wilkes-Barre; consequently in one question which was framed there seemed to be some confusion —Mrs. Flannelly said in answer to a question which your honor asked that the freight train was going down north, toward Scranton, as I gathered. I want to correct that.

A. This freight train I am referring to, I didn't know which train you had in mind at the time.

Q. But the freight train which was on the track nearest you?

A. Was going south.

Q. That was toward what place?

A. Pittston.

Q. How far down toward Pittstou can you see down, and see the second track, when you look at the time when you stopped your horse the second time at the second rail?

MR. TORREY.

Q. We object; I think we have been all over that on both sfdes, your honor.

THE COURT.

I don't think you are entitled to go all over this again.

MR. TORREY.

I object to it as repetition.

MR. SHERWOOD.

Q. About how far could you get a view down that track when your horse stopped the second time, and you looked down toward Pittston, now far could you see the second track?

THE COURT.

I don't understand what that is directed to; she stopped before going on the track, she said. How far could she see then?

MR. SHERWOOD.

Q. How far could you see down the second track, when you stopped the second time with your horse's feet about the first track?

A. To the nearest of my judgment, I should think about 300 feet.

MR. TORREY.

We now renew our objection, your honor, that this is repetition.

CROSS EXAMINATION.

MR. TORREY.

Q. You were driving, were you?

A. Yes sir.

Q. Were you sitting in the middle?

A. Yes.

Q. Your daughter in law was on the stand, and made an answer that leads me to ask you when you married, Mrs. Flannelly?

A. Twenty-five years last October.

Q. And how many children did your husband then have?

A. One boy.

Q. That was Hugh?

A. Yes.

Q. How old is your oldest child, now?

A. 23 the 9th day of July.

Q. And his name?

A. John.

Q. And the next one is this daughter?

A. No, sir, I had Anthony between them.

Q. How old is he?

A. He is 21—She will be 20 years in October; next October she will be 20 years, the 18th day.

Q. How many children of yours have you living?

A. I have nine and one dead, and a miscarriage: if nothing had happened I would be the mother of eleven—If nothing had occurred I would have been the mother of eleven.

Q. I understood you to say, and your attention has been called to it again today, I understood you to say yesterday that your horse was upon the second track when the train first came in sight?

A. My horse's feet, yes, was on the second track.

Q. You didn't stop then did you?

A. The horse, I say, stopped and reared.

Q Did you stop with your horse's feet on the second track?

A. No, sir I didn't stop, I told you the horse had stopped and pranced for a moment or two seconds or three seconds, she pranced, and her ears went up, and I hit her with the whip—just shied over, about a moment—whether it was the other noise I don't know, or the noise of the other train—

Q. From that point you had quite a long distance of sight down the track?

A. The train was approaching on me too, from the viaduct.

Q. Yes, and you said yesterday you could see the viaduct?

A. I could see the viaduct if nothing was in my way from the crossing plainly, but if there was anything in my sight of course you would have no opportunity see it.

Q. Now, I notice you hold your left arm rather peculiarly?

A. I don't know—my left hand seems to be—I don't know, I cannot explain it; my left hand seems to have more hesitation than the other one, it shakes more.

Q. Can you move your arm around?

A. Yes sir.

Q. You can move it freely?

A. Yes, sir, I can do that (indicating) with it, but I cannot put it back to comb my hair, or put my hair up with it.

Q. Why not?

A. I don't know; there must be—There seems to be no power to it.

Q. I noticed when you were describing the way the passenger train hit the wagon, you did this way (indicating) with your left hand, on your right?

A. No, sir, I didn't, and nobody saw me raise my hand.

WILLIAM STRUBECK, Recalled by Plaintiff.

FOR RE-DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mr. Strubeck, yesterday in speaking of the train, or the cars which you saw over on the—

MR. TORREY.

Please make an offer Mr. Sherwood.

MR. SHERWOOD.

I offer to show by the witness on the stand that he didn't intend to give the impression that he knew that this identical train which was standing there had been standing there for several days; that he didn't know when that train came in there; that he had seen trains standing there other days; he doesn't know whether it was the same train or not; and desires to explain his evidence to that effect.

MR. TORREY.

I object to it as an entirely unnecessary explanation, and palpably an effort to fix up the witness's testimony.

THE COURT.

The objection is sustained. I don't think it is good practice to go back. Note an exception for the plaintiff.

DR. WILLIAM F. PIER, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Doctor Pier, where are you located?

A. At Avoca.

Q. For how many years have you been a practicing physician?

A. Thirty years.

Q. Are you a graduate of some medical school?

A. The Bellvue Hospital Medical College.

Q. Where you—Whether or not you were called to attend Mrs. Flannelly after she received her injuries?

A. Yes sir.

Q. When did you first see her?

A. The next day after the accident.

Q. Where?

A. At her house.

Q. Where was she in the house?

A. She was in bed.

Q. What was her condition?

A. Well, the woman was lying in bed; she was very nervous and excited, hadn't slept any all that night, and there were some marks upon her, upon the side of her face, up along the side of the head, and bruised on the hip and leg.

Q. For how long did you treat her for the injuries?

A. Well, I treated her for—Well, I have been prescribing for her right along ever since the accident.

Q. Still prescribing?

A. She is still taking medicine.

Q. Do you know about how long she was in bed?

A. I think she was in bed about 5 weeks—5 or 6 weeks.

Q. How many visits did you make to the house?

A. I made four visits to her home.

Q. Four visits at the home?

A. Yes, sir.

Q. How far is your place from there?

A. Well, the way I drive I should think it would be about 5 mile.

Q. Easy of access?

A. No, sir.

Q. Have they visited you at your office at times since?

A. Yes.

Q. Can you tell about how many times?

A. Probably once a week since she was able to be out.

Q. Did you know her before she was injured?

A. For several years.

Q. What was her condition of health prior to the injury, at the time of the injury?

A. She was in good health; she was able to walk in and out from her home, often.

Q. Can you give us an idea of how this woman suffered—some idea whether her suffering was much or little, from the injuries which she received, and resulting from those injuries?

Q. She has suffered a great deal; in the first place the shock, and the pain from the injury at the time she either fell out of the wagon or jumped out, (I don't know which) but she must have struck pretty heavy on the ground, for there were scratches along side the face as though she struck in the coal dirt, and contused on the side—black and blue.

Q. Do you recollect the bruise on the head?

A. Yes, sir, on the side of the head.

Q. What was the condition of her neck, and—well we will say of the neck, you see this bent condition of the neck, is that at present time permanent?

A. It is worse. Well when she was in bed, it didn't show at all, but since then it has become and is becoming worse.

Q. Did she have any of that trouble before the accident?

A. I don't think so.

Q. What is the present condition of her spine or shape of her back?

A. There is a curvature of the spine.

Q. Does that show upon her body, upon stripping her?

A. Yes, sir.

Q. What would you say as to her present condition being one of suffering?

A. Well I should say she was suffering considerably

Q. From the time of the accident to the present, what would you say about her having been incapacitated for labor and work?

MR. TORREY.

I object to this question. I think this is an intelligent professional expert, and he ought to be permitted to testify.

THE COURT.

Q. What has been the effect upon her, since the accident, with regard to her ability to labor—he may tell that.

A. I don't think she has been able to do her work around the house since.

Q. You say that simply from what has been told you, or from what you know?

A. From what I know.

MR. SHERWOOD.

Q. Doctor, whether or not, in your opinion, the injuries this woman received, are permanent?

A. I should think they are permanent.

Q. Whether or not in your opinion, and from your knowledge of this case, this woman will require for the balance of her life, medical care and treatment?

MR. TORREY.

I object to the question.

THE COURT:

It is leading.

MR. SHERWOOD.

I don't know how to correct it. I don't believe.

Q. What if any care or medical treatment will she probably require in the future?

A. I think she will always require care and frequent as long as she lives.

Q. What about the probabilities, future probabilities of her being able to do work.

MR. TORREY.

You have just asked that.

A. She will never be abe able to perform her household duties as she did before.

MR. SHERWOOD.

Q. What is her condition now, as the result of those injuries, what would you say was her present physical and mental condition?

A. I think the woman is a wreck, physically.

Q. Is a wreck physically?

A. Yes sir.

Q. What, in your opinion, is her condition as to her nervous condition, or mentally?

A. It is not near as strong as it was before.

Q. Yon have been here all the afternoon, doctor?

A. Yes.

Q. Since the court convened, and you heard the various witnesses called on the part of the plaintiff, in which they detailed how this woman was apparently injured, and how she suffered. If a woman was sound and healthy, and free from all these various conditions of pain and suffering prior to the injury, and there is no other known cause for these conditions, than the accident, and resulting injury, what would you say was the probable cause of her condition?

MR. TORREY.

We object to the question, your honor. The doctor has had the same opportunity to observe the conditions.

THE COURT.

I don't think you can put a hypothetical question in that way. I sustain the objection.

MR. SHERWOOD.

Q. A person, an individual is in good health; they are driving a horse hitched to a lumber wagon across a—

THE COURT.

Why not ask him straight out, whether the condition which he found, in his opinion, could or could not result from such an accident as we have here

MR. SHERWOOD.

Q. Whether the conditions which you find here could be the result and outgrowth of an injury received in such an accident as has here been described?

A. Yes, I think they could.

CROSS EXAMINATION

MR. TORREY.

Q. You first saw her the day after the accident?

A. Yes.

Q. She was then in bed?

A. Yes

Q. You say at that time the distortion of the neck, which is now perceptible, could not be observed?

A. I didn't notice at that time.

Q. Not until after she got out of bed?

A. No, sir, not until she had been to my office a couple of times—two or three.

Q. Did you diagnose her case when you first saw her?

A. Well, of course I diagnosed the case of nervous shock, at the time, and the injuries that were there.

Q. Well now, just describe more particularly those injuries; first we will take the injury to the head—what did that consist of?

A. Well, there were marks upon the side of the head as though she had fallen in the dirt along side the track.

Q. On the left side or the right side?

A. I think they were on the left side.

Q. And they were just scratches, were they?

A. Scratches, and a little redness, and swollen a little.

Q. That was not in the hair, but in the face?

A. Along in the edge of the hair, and extending in the hair a little.

Q. There was no contused wound there or bruise?

A. Well, I would call that a bruise.

Q. There was no hard swelling?

A. There was some swelling but not very prominent.

Q. And the thing you observed was scratches?

A. Yes. And of course the discoloration, it was red, like what you get in a brush, burn or accident.

Q. That was not of sufficient prominence to produce any concussion of the brain, was it, apparently?

A. Well, you couldnt't tell that.

Q. You didn't consider it so, yourself, did you?

A. At the time, no, I didn't notice any signs of a concussion of the brain.

Q. Now we will come down to the other bruises —what other bruises did you find?

A. I found marks along the side and down along the hip and on the calf of the leg.

Q. Be a little more specific; as to the side, where was any bruise you found on the side?

A. About in this location (indicating)

Q. Can you describe it scientifically?

A. And there, a discoloration of the skin, the same as on the hip and thigh.

Q. I don't mean, describe the appearance, but I meant to describe the location of the highest point where that was?

A. Between the hip and the short ribs.

Q Was it to the front, or back or side?

A. About on the side as near as I can recollect.

Q. What was the extent of that bruise doctor?

A. Well I should think you could cover it with your hand.

Q. Was it round or long?

A. It was longer than it was wide,

Q. Extending up and down, or across?

A. Up and down.

Q. Did you treat it at all?

A. I prescribed some lotions for external applications.

Q. What lotion?

A. I think I prescribed a lead and opium wash for it?

Q. What would be the effect of that, simply to reduce the inflamation?

A. To reduce the inflamation, yes, sir.

Q. There was no swelling at all, was there?

A. No, sir.

Q. And all you found upon the limb was some discoloration?

A. Yes—no bones broken.

Q. Do you think anybody falling from a height of three or four feet and striking on the hip and leg and the head at the same time,

A. Well, being thrown from a wagon, and struck with a locomotive, would hurl a person with quite a good deal of force to the ground.

Q. But if it was found to be a fact, by the jury, that she jumped from the wagon, and landed upon her feet, how could you account for those bruises?

A. I would not know how to account for them, except that she had fallen.

Q. You would not know any other way to account for them?

A. No, sir.

Q. The trouble from those bruises didn't last long, did it, so far as you know?

A So far as I know, the bruise, itself, externally, did not.

Q. Your first visit was the day after the accident?

A. Yes, sir.

Q. And when was your second visit? Have you got a book giving the dates?

A. No, sir, I haven't it with me.

Q. Can you give us the date of your second visit?

A. It was about the third after, the third day after.

Q. What did you prescribe medicinally—what medicine did you prescribe for the patient?

A. I prescribed nerve sedatives.

Q. What were they?

A. Bromides and chloride, to produce rest and sleep.

Q. Bromides and chlorides to produce rest and sleep. Then what you prescribed for was nervous shock, and not for physical injury?

A. I gave her some medicine to clear out the bowels—calomel.

Q. Well, I say, what you prescribed for her was for nervous shock?

A. At the first, yes.

Q. And not for any physical injury? I say, you gave no prescription for physical injury, except the mere sedative lotion?

A I gave her sedative lotion, and medicine to clear out the bowels.

Q. We mostly always do that, for everything, don't we?

MR. SHERWOOD.

I object.

A. No, sir.

MR. TORREY

Q. You say your second visit was on the 3rd day after?

A. Yes sir.

Q. What did you prescribe then, if anything—did you change your prescription?

A. No, sir, I didn't, the second time.

Q. You didn't change your prescription the second time?

A. No, sir.

Q. Did you find that your medicine had had any ameliorating effect on her nervous shock?

A. Some; it produced rest at night, and gave her a little more quiet and ease.

Q. More quiet, and not so excitable—she was very hysterical and nervous at the first?

A. Very nervous.

Q. When was your third visit, how long after your second?

Q I think about a week following—it was some time time the following week.

Q. At that time did you make any prescription?

A. Yes, sir.

Q. Well, what was it?

A. I prescribed a tonic for her at that time, along with the other medicine; told her to only take the nerve sedative just as little as she could get along with; I didn't care for her to form a habit of taking that drug right along, but only using it when you have to, to produce quiet and rest.

Q. What did you find to be her condition as to nervousness on that third visit?

A. She was still nervous.

Q. As much so as at the second visit?

A. No, sir.

Q. And then you prescribed, for the purpose of trying to build up her nervous system?

A. Yes, sir.

Q. By tonics. Any other thing that you prescribed for her at that time?

A. Not at that time

Q. How long after was it that your fourth visit was made?

A. Well I should think it was a full week following that.

Q. What did you then find to be her condition?

A. She was still nervous, and complaining of no appetite, and complained of pains at different times.

Q. Where?

A. Said she had pains in her side, and pains in her head.

Q. To what did you attribute them—speaking medically now?

A. Well I think it was the result of her accident.

Q. Did you think it was the result of the nervous shock?

A. Not altogether nervous shock, but the result of the injury she had received when she had fallen.

Q. Did you prescribe for anything else at all?

A. I gave her opiates to relieve the pain then.

Q. Was this your last visit to the house?

A. To the house, yes sir.

Q. You never have visited there again?

A. Not at her home.

Q. Since then?

A. Not at her home.

Q. That must have been some time the latter part of August, was it?

A. Yes sir.

Q. You think?

A Yes.

Q. The last visit—and when, after that, did she first come to your office, if you can remember about how long?

A. Well it was, I should think, three or four weeks following that

Q. How did she come to your office?

A. They drove her in.

Q Who drove her in?

A. Some of the family, I don't know just who.

Q. Did you make an examination at that time?

A. Well, I just asked her how she felt, and her symptoms.

Q. Did you make any prescription for her?

A. I gave her a prescription.

Q What did you prescribe then?

A. I prescribed tonics for the nervous system.

Q. What tonics?

A. Nux vomica, cinchona, and gentian.

Q. About how long would you say it was after that when she called again?

A. I think she called about once a week after that.

Q. For how long?

A. Up till within a week or ten days ago, the last time she was in my office was on the 13th of this month.

Q. What has been the course of treatment since then?

A. I kept her on tonics, and that is about as much as I did for her.

Q. How do you describe, medically, the condition of her neck?

A. Torticollis.

Q. How do you spell that doctor?

A. T-o-r-t-i-c-o-l-l-i-s I think

Q. Will you define that in English?

A. It is a case of wry-neck.

Q. Isn't that properly spelled T-o-r-t-i-c-o-l-l-i-s, doctor?

A. Possibly.

Q. You say that is usually called wry-neck?

A. Yes sir.

Q. Will you tell us what are the recognized causes of it?

A. It might sometimes be caused by rheumatism, sometimes by the result of an accident, or spinal trouble.

Q. Now, what sort of an accident would cause it?

A. Any accident that would affect the spinal column.

A. Any accident that would affect the spinal column?

A. Yes.

Q. Do you mean to say that that defect or disease is in any way connected with the spinal column?

A. It is affected with the nerves of the spine.

Q. What nerves? Will you name them?

A. No, sir, I cannot name them.

Q. Isn't it sometimes caused by pure hysteria?

A. I cannot say as to that Mr. Torrey.

Q. You would not deny that it might be?

A. I do not know.

Q. How many cases have you ever treated of this kind, doctor, of Torticollis?

A. Not very many.

Q. Well, tell us how many?

A. I could not do that, Mr. Torrey.

Q. Well, have you treated two?

A. I might have treated two, yes.

Q. What treatment are you giving this lady for torticollis?

A. I am not giving her any treatment at the present time.

Q. What treatment have you given her at any time?

A. Just what I told you.

Q. Just tonics?

A. Yes sir.

Q. No effort at local treatment at all?

A. No, sir.

Q. Just treating the general nervous system?

A. Yes; I don't know whether Dr. Butler has given her any treatment for that cause or not: they have consulted him; he may have given her something.

Q. You say that Mrs. Flannelly has curvature of the spine?

A. Yes sir?

Q. Just what part of the spine does the curvature show itself?

A. I think it is in about the dorsal region: the cervical and dorsal regions.

Q. About where is that on the spinal column, doctor?

A. It is about, below the nap of the neck—just below.

Q. Do you associate that in any way with this wry-neck?

A. All of these symptoms have come on since she had this accident.

Q. Sir?

A. They all have come on since she had this accident.

Q. I say, is there any association between the curvature of the spine and the wry-neck?

A. I should think they were dependent on each other.

Q. Which followed the other, in your opinion?

A. The wry-neck.

Q. The wry-neck follows the curvature of the spine.

A. Yes sir.

Q. What are the causes of curvature of the spine?

A. Sometimes due to diseased condition of the bones of the spine.

Q. Any others?

A. Accidents, injuries.

Q. Well now, accidents; do you mean to say that an accident without producing almost fatal results can curve the spine?

A. It can produce diseased condition of the bones, and in that way bring it on.

Q. Have you any history of this case which would show a bruise or a blow that could produce curvature of the spine in this patient?

A. I don't know just how much of an injury she may have had at the time of her fall from the

wagon. It might have injured the spine at that time; and no visible signs of an injury.

Q. You are assuming that she did fall from the wagon?

A. Yes.

Q. In which direction is this curvature of the spine—in which direction is the curve, in other words, forward, backward, or—

A. Lateral curvature.

Q. Lateral, to the right or left?

A. To the right.

Q. Now, you said, in very general terms, that Mrs. Flannelly was a physical wreck; cannot you describe more minutely in what particulars she is a physical wreck?

A. Well, the lady has not been able to go about, has she, as she did before; she is wasting away; and the muscles of her back, on the left side —on the right side, are very much more prominent than the left, and her hands and arms are nervous and twitching.

Q. Anything else?

A. And from the position she is compelled to carry her head.

Q. Is there anything else, except nervous shock, to which you could attribute any defects of her mind, doctor?

A. Unless there might have been some lesion of the head, at the time—lesion of the brain, probably.

Q. You didn't discover any?

A. I didn't, no.

Q. Now in what does her mental processes fail, have they ceased to be rational and normal?

A. Well, her memory is not as good as it was.

Q. You heard her on the stand here, did you not?

A. No, sir I did not.

Q. You heard her today—by what test do you determine that her memory is defective?

A. Oh, just from conversation with her, and she has been in my office at times. Of course I could not give you expert testimony on this case, but just from general description as a general practitioner.

Q. You don's pretend to be an expert on nervous disorders?

A. No, sir.

Q. On mental disorders?

A. No, sir

Q. Then you speak with no more authority than a layman on those subjects?

A. Well, not exactly that either.

Q. Anything else about her mental process that is not normal besides her lack of memory?

A. Not that I have noticed.

THE COURT.

Doctor, what is the amount of your bill?

A. I should think I ought to have $150, for what I have done for her.

MR. TORREY.

Q. How much?

A. $150.

Q. It is not paid yet?

A. No, sir.

Q. Is the amount of your bill at all contingent upon the plaintiff's recovering in this case?

A. No, sir.

Q. You have no understanding about that?

A. No, sir.

Q. Have you ever rendered any bill?

A. Not yet, no sir.

Q. You mean to be understood that if the plaintiff should not recover you will still expect to get $150.00 from her?

A. I should ask it.

DR. E. J. BUTLER. Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Doctor, where are you located?

A. Wilkes-Barre.

Q. Are you a graduate of any school?

A. Yes.

Q. What school or schools?

A. Graduate of the College of Physicians and Surgeons at Baltimore; Post Graduate course at Johns Hopkins; and Post Graduate course at the Medico-Chirurgical College of Philadelphia.

Q. How long have you been practicing, doctor?

A. 15 years.

Q. How old a man are you, please?

A. Born July 10th, 1860.

Q. Doctor, during the time that you have practiced, whether you have been physician for any hospitals or other places where you have come in contact with nervous diseases?

A. Yes, I was seven years physician at the Central Poor District, out-door service, Luzerne County, having charge of all their outside work; and have been for nine years on the staff of the Marcy Hospital in Wilkes-Barre, since the erection of it, I think about nine years.

Q. During that time, whether or not you have come in contact with an experimental knowledge, and knowledge as a practitioner, with individuals who have been injured in various ways?

A. I have.

Q, And treated nervous diseases?

A. Yes, sir.

Q. Many?

A. Yes, a great many.

Q. Are you acquainted with Mrs. Mary Ellen Flannelly?

A. Yes, sir.

Q. For how long have you known her?

A. Since last December.

Q. Where did you first meet her?

A. Met her at my office.

Q. Did you take up the treatment of her, professionally?

A. Yes, sir.

Q. Will you explain to the jury whether you examined this woman at the time, and if so, what you found to be her condition?

A. Yes sir I have examined her several times since, and at the time that she came, and, of course, we find this woman suffering from a chronic attack of torticollis or wry-neck. I discovered also a murmur in the right lung, showing a trouble here in that lung tissue. This woman has a very quickened pulse, rapid pulse with weak action, showing a weakened condition of the heart. She has a curvature of the spine, to the right, a right lateral curvature of the spine. The eye-sight is affected; eye-sight not normal at all. She has a backward—I would like to give this plain to the jury, I don't want to use technical terms if I can avoid it; the womb is tipped back-

ward, pressing along the spinal column, and causing great trouble in her bowel movement causing obstinate constipation, and she has enlargement of both ovaries—a chronic enlargement of both ovaries.

Q. Anything else?

A. Those are about the main conditions we found in this woman.

Q. Doctor, this condition in which this woman was found in December, does it still continue?

A. Yes, sir.

Q. Whether or not that condition is one of suffering?

A. Positively suffering, yes sir.

Q. A little, or great?

A. Great suffering. Great suffering; her ovaries are causing great trouble, a trouble there that could not be relieved without an operation.

Q. Whether or not this woman in the condition in which you found her, is capable of performing the ordinary avocations of the ordinary house wife?

A. She is not—Very incapable.

Q. Whether or not she, in your opinion, is permanently disabled?

A. Yes sir.

Q. Are those conditions which you have detailed, all permanent?

A. The ovarian condition can be relieved by an operation, if she should survive the operation of removing the ovaries; and the womb of course might be benefited by a long course of treatment—the tipping of the womb.

Q. What about the condition of the neck? What have you observed, if anything, as to that being in a fixed condition, or is it progressing?

A. These, generally, are very progressive—of the neck, this torticollis is a very progressive affair; it involves the muscles of the back and neck. I made an examination of the pinna, or lower part of the right ear, to the collar bone or clavical, as we call it in medicine, and we found 6½ in on the right side; from the pinna or the lower part of the ear, to the collar bone or clavical on the left side, 2½ in. showing a contraction of 4 in. in that side.

Q. What will be the final outcome, I mean as to the position of the head?

A. Brought forward in a position always looking towards the earth, in a huddled condition.

Q. Doctor can you show this jury the curvature of this woman's spine?

A. If I can expose her, I will show it in an instant.

Q. I ask you to expose her to the jury.

(After discussion back and forth between counsel).

THE COURT.

The jury will take, as the saying is, the will for the deed. The question is, will you allow a physician to see this woman?

MR. SHERWOOD.

I will not. I object to it.

MR. TORREY.

I don't ask for a general examination, but only such an examination as the gentleman was willing to expose before the jury. I not only ask it as a favor from the counsel, but I ask that the court direct it to be done.

MR. SHERWOOD.

I object. There is no power in the court

to direct it to be done. I would not stand on that, for I cheerfully submit to the court, but there is no power in any court that we submit to an examination on their side.

THE COURT.

The request is made by counsel to have this examination, which is entirely in line with what you were willing to do, except as the jury expressed a preference it should not take place so far as they were concerned; they were satisfied to have a demonstration from the physicians. Now you were going to have Dr. Butler examine her; and they desire to have this examination made in the presence of their physician, and they have asked it. Undoubtedly if I refuse to direct it, an exception will be taken.

MR. SHERWOOD.

Will your honor permit me, if this man goes on the stand; if he should say there are not these conditions that we say exist, to then show her back to the jury?

THE COURT.

I am not in the custom of saying what I am going to do in advance. I will rule upon the matters as they come up.

MR SHERWOOD.

I feel compelled by this talk to do what I think I ought not be required to do.

THE COURT.

We don't have to stop now. If you accord that privilege, it can be done privately and quietly. Proceed with Dr. Butler, and we will come to that matter afterwards.

MR. SHERWOOD.

Q. Doctor, if this person, or any person, was in reasonably sound health, and free from the conditiens which you found upon this woman and which you have detailed here, and in which she now is, as you have described it, and was riding in a wagon which was struck so that she was either thrown or jumped and fell in some manner, so that she was then and there injured, bruises shortly afterward appearing upon her person, some upon her head and some upon her side, over the ovaries—one side at least, and down the side, and back of the thigh of one leg and around the back and the side of the hip, and a little bit toward the spine, on the side, and that woman was in such shape that she lay upon the ground, and also got up upon her feet in an excited way and screamed and tore her hair and was in such condition so that from 12 o'clock until 5 o'clock the following morning she lost her voice; until 12 o'clock of the same night she did not recognize her own children, or at least her well-known daughter-in-law, and could not speak—lost her voice from 12 o'clock to 5;—a mis-carriage fol ows four days afterwards, or five, and she is sick in bed for about six weeks from July 30th until about the middle of September, after which she is out and in bed; that, if there is no other known cause for those conditions, what would you say caused the condition in which the woman now is?

MR. TORREY.

We object to the question for the reason it says several facts which are not in evidence here.

MR. SHERWOOD.

If the counsel will kindly draw my attention to them, I will have them eliminated. I don't know of any.

THE COURT.

Q. Have you heard this accident detailed?

A. I did.

Q. Do you think her condition could be attributed to that?

A. It could; that is my opinion, without any other known cause. Of course her condition which she has here, might come from other causes. If there was no other cause, and she was in a healthy condition, I should say this accident caused it.

MR. SHERWOOD

Q. Doctor, what is the condition of her mentality—Her nervous—

A. I haven't gone deeply into her mental condition at all. She is a nervous woman, hysterical woman; a woman bordering on melancholy; a melancholy woman; sad, despondent; not at all cheerful, and very erratic—a woman who would get up in the office and walk around, without any known cause, and sit down again—I have seen her do it in her nervous condition.

Q. Whether or not in the future, she will require medical attention and care?

A. Yes sir I should say so.

Q. What other kind of care, if any, do you think she will require?

A. I think she will require the utmost care. In fact I think the woman, in time, will be helpless; as things are progressing now, I think she will require assistance of others around her to help her along.

Q Whether or not, in your opinion, her injuries are permanent?

A. I should say so.

Q. Whether or not since you have known her, she has been able to perform any of the usual avocations?

A. I would not say that. I have seen her in the office; she is able to come from the street cars to my office, and back again; there doesn't seem to be any paralysis of the lower limbs; she seems to walk pretty well; my office is up stairs; she takes a long time to come up the steps—I have watched her on two or three occasions coming up the steps, with a labored climb. I should think she would make a very poor domestic at the present time, or a housewife.

CROSS EXAMINATION

MR. TORREY.

Q. Doctor, when do you say you first saw her?

A. Last December.

Q. Did she come alone to your office?

A. She came alone to the office first, and her husband, later on, came in after.

MR. SHERWOOD:

Q. The same day?

A. The same day, yes, sir.

MR. TORREY.

Q. No one else with her?

A. No, sir.

Q. By whom were you first consulted with reference to her case?

A. By Mrs. Flannelly, the lady herself.

Q. By her, herself?

A. Yes, sir.

Q. Was any one else at any time present at any of your examinations of her besides herself and her husband?

A. Yes, sir, Mr. Sherwood was present at the examination that Doctor Burns gave in my office, and which of course I took no active part in, only was an observer.

Q That was the only time?

A. Yes, sir, that was the only time.

Q. I think you said—I will ask you the general question now, first—How many of these difficulties or ailments which you have described, might be attributable to nervous shock, without any physical injury?

A. Well the torticollis or wry-neck of course could come from a great many conditions.

Q. That could come from hysteria could it not?

A. Well not so much from that as severe exposure—rheumatic conditions; severe exposure, to colds, and neuralgic conditions also would cause those conditions. Of course the chronic conditions I found in the ovaries at the the present time, are in a great majority of cases due to mis-carriages.

Q. Don't they often occur from child-births as well?

A. Well, not so frequently—I think they are very infrequent; They are possible, even with child-birth, yes. Of course the condition I found in the lung—the murmer in the lung, might developed in a very serious condition.

Q. You would not attribute that to the accident?

A. No, sir, I would not.

Q. That would not be due to the accident?

A. No, that is an exposure action, or hereditary.

Q. Then you would not connect that in any way with the history of this accident?

A. Well, no, not directly—indirectly you can.

Q. And neither, I presume, would you attribute the heart trouble, which you found, directly to the accident, would you?

A. Not necessarily; the heart can be affected by other conditions.

Q. You say that the womb is tipped back so that it presses upon the spinal cord?

A. Yes, sir. That is what we call in medicine "retroversion" or the tipping backwards.

Q. Where does the spinal cord end with reference to the location of the womb?

A. Well, the spinal cord; of course, there are different branches, the spinal cord ends above the womb, but it doesn't affect the spinal cord directly, it affects the branches.

Q. Then you refer to the nerves that are back of the womb and which themselves connect with the spinal cord, and not the spinal cord itself?

A. Not the spinal cord itself, no; we have indications of a tipping backwards of the womb, generally causes an obstinate constipation on account of pressing against the nerves of the bowel.

Q. Does that result from pressure on the bowel itself?

A. Yes; the of the bowel is destroyed by this pressure.

Q. And retroversion of the womb is not an unusual disorder in women?

A. It is not, sir.

Q. Even where there has been no accident?

A. It is not necessary to have an accident for a retroversion of the womb.

Q. It can occur without traumatic origin?

A. It can.

Q. It cannot?

A. I say it can.

Q. What other causes produce it?

A. Destruction of the muscles of the broad ligament, the tenacity of the broad ligament, the ligament being elastic, would drop down to a certain extent, and not get back—also heavy lifting—heavy labor.

Q. Yes—hard work?

A. Hard work, yes sir.

Q. Over straining?

A. Over straining will do that, yes.

Q. Are you an expert on gynecology?

A. I wish I was, sir; I am an every day doctor, and not a high-bred, as you called a certain gentleman a while ago. I try to be a full fledged physician, but not an expert at all—I try to know my business.

Q. Well now this torticollis, you have given one or two of the causes of it, can you give any others?

A. We have the traumatic condition also. We have the exposure condition, and the neuralgia condition, and the rheumatic condition, and last, the traumatic condition.

Q. Just what is torticollis?

A. It is an inflammation of the muscles of the back and neck, especially the sterno-cleido muscle.

Q. It produces a contraction of the muscle, does it?

A. Yes, sir.

Q. And draws the head down?

A. Yes.

Q. Your opinion then is that it is a muscular disease?

A. Muscular and nervous.

Q. Both?

A. Any of the nerves which control; all muscles are controlled by nerves.

Q. Then it is both muscular and nervous?

A Yes.

Q. What nerve is it?

A. The cervical nerves.

Q. Any one in particular?

A. Now, you are getting me back to college again. You want me to go back to 15 years ago—

Q. You won't specify any particular one?

A. No, just the cervical nerve.

Q. Are there different varieties of torticollis?

A. Torticollis is torticollis; wry-neck is wry-neck; only one become more extensive in time than the other.

Q. How many have you treated, doctor?

A. Five cases to my knowledge, and those we treated in the Marcy Hospital.

Q. How many of those could be traced to traumatic origin?

A. Two.

Q. Now, did you ask Mrs. Flannelly when she first came to you, or at any other time, to give you a history of her case?

A. I did sir.

Q. Did she tell you how she received her injuries?

A. She sat down and gave me her whole history from a to z.

Q. I say, did she tell you just what occurred to her on that day when the accident occurred?

A. Just as near as I recollect, she told me all about this child being killed, and she was struck by the train.

Q. She said she was struck by the train?

A. If I remember, was thrown out—I cannot recall precisely what she did say, but I know it was some railroad accident.

Q. Then you don't know just how she was injured from anything she told you?

A. I may have known then, but I forgot now the language she used, or the discussion?

Q. Now you say that the trouble with her ovaries might be cured by an operation?

A. Yes.

Q. Those operations are not regarded as particularly hazardous are they?

A. It all depends on the patient operated on, and the condition of the patient. In her case I say it would be fatal.

Q. Why?

A. Why on account of the nervous condition, and the poor heart, weakened pulse; She is an anemic woman; a woman where the blood is not in good force, not in good power. There are more white corpuscles in her blood than red corpuscles at the present time.

Q. You have examined her blood?

A. Yes, sir, I have examined her blood, and examined her urine, and every part of her.

Q. What was the result of your examination of the blood?

A. Anemia.

Q What proportion?

A. I should say about two to one.

Q. What?

A. White corpuscles to one red corpuscle—a preponderance of white.

Q. You counted them, did you?

A. No, guessed at it. No microscope.

Q. The trouble you described in her heart, is weakened pulse and rapid beat?

A. I would not say there is any regurgigation.

Q. That is due to her nervous condition, isn't it?

A. Nervous heart, yes.

Q. This curvature of the spine you say is a lateral curvature to the right?

A. Yes, sir.

Q. And about where does it begin, and end?

A. Beginning about the 4th dorsal: the 4th dorsal vertebra, extending about the 9th.

Q. Is that upward or downward?

A. Downward

Q. To what do you attribute that?

A. Well, there would be the two conditions there—The railroad spine is a common factor—the railroad not always, but in a great many cases, show a bad spine. A railroad spine is an every day expression, but a contraction of those muscles there would have the effect also upon that, bending it over.

Q. Curvature of the spine often comes from the habit of holding the head in a certain position.

A. Yes, precisely so.

Q. And round-shoulders, is a curvature of the spine?

A. It certainly is—but what they call a forward curvature.

Q. Now Mrs. Flannelly—You say Mrs.

Flannelly's muscular action of the lower limbs is in no way paralyzed, or anything—

A. I have made attorney, a special examination of both her upper extremities and lower extremities, and could find no paralysis.

Q. No wasting?

A. No sir, no atrophy or wasting at all, at the present time in those limbs. There is if I may go a little further, a hypertrophy, or increase, of the left muscles of the neck, and a decrease in the muscles on the right; one shows an increased power and the other a decreased power—a similar atrophied condition, to my eye. I would have to contradict my other doctor on that, because he said the opposite.

Now 5 p. m. court adjourned to 9:30 tomorrow morning.

Now 9:30 a. m., Wednesday, March 25, 1908, court re-convened.

John FLANNELLY, Re called for Plaintiff.

RE-DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mr. Flannelly, I don't think I asked Dr. Butler yesterday or you, about the amount of his bill; have you received a bill from Dr. Butler?

A. Yes, sir.

Q. How much is it, to date?

A. $75.

Q. Now Mr. Flannelly, can you give us some idea (I didn't think to ask you yesterday) what would be a fair estimate of the value of your wife's services, what she performed for you, per munth, before she was injured?

MR. TORREY.

I object to the question, your honor. I think some preliminary questions ought to be asked, as to how it should be estimated.

THE COURT:

Haven't the preliminary questions already been asked?

MR. TORREY.

I didn't hear any preliminary questions.

THE COURT

As to what she had performed, as to what she had done?

MR. TORREY

Certainly, what she had done is in evidence to a certain extent, but whether he has any means of knowledge.

THE COURT.

I question whether you are entitled to that evidence. If this is admissible, I think the preliminaries are already in evidence. You may make an offer of what you propose to prove.

MR. SHERWOOD.

Propose to prove by the witness on the stand who is one of the plaintiffs, and the husband of the injured party, the value of her services performed for him before the injury, and of which he has been deprived, because of the injury received in the accident; what it would amount to per month.

MR. TORREY.

For what purpose?

MR. SHERWOOD.

This for the purpose of offering some substantial aid to assist the jury in estimating the value of the services lost to him, because of his wife's injuries received in this accident.

MR. TORREY.

It is objected to as irrelevant and incompetent, and of a speculative character, and not establishing the proper measure of damages.

THE COURT.

Your offer is very vague, but aside from that I question whether it is admissible, if I understand what you mean by it; your offer is so indefinite and vague?

MR. SHERWOOD.

The meat of what I intended to offer is to show by him, as best he could, how much it would cost him to replace those actual services; of course not the affection, or anything of that sort—that doesn't go in; or the loss of family privileges and pleasures, nothing of that sort, but the price it would take him to replace the work, is what I thought we could give to the jury, along those lines. I realize it would be difficult to measure.

THE COURT.

I think you had better leave that to the jury. I reject your offer as too vague, if you are going to take an exception.

MR. SHERWOOD.

I think I will take an exception to that.

THE COURT.

Note an exception for the plaintiff.

MR. SHERWOOD.

Q. Mr. Flannelly, it was testified yesterday by one of the physicians, some of the causes for wryneck, and this curvature of the spine I think it was, and some of the other troubles which your wife is said to have had since this accident, were of rheumatism, and rheumatic tendencies; did your wife have any trouble of that kind before this injury?

MR. TORREY.

What is the purpose of this—do you propose to contradict your own witness?

MR. SHERWOOD.

I propose to show that she didn't have any such troubles, out of which this trouble could grow.

A. No, sir, she hadn't.

Q. Had she any womb trouble, or ovarian troubles, prior to her injury?

A. No, sir.

MR. TORREY.

I was trying to object to the prior question, your honor, with regard to the rheumatism.

THE COURT.

It seems to me that is admissible

MR. TORREY:

Is he competent to say on that point?

THE COURT.

He may state whether she made any complaint.

MR. SHERWOOD.

Q. Did she ever make any complaint of rheumatism, or anything of that sort, before the injury?

A. No, sir.

Q. Did she ever, before the injury complained of, complain of heart trouble, or a weak heart?

A. I never heard her complain in the world, before.

Q. Did she ever complain of lung troubles, or any weakness of the lungs?

A. No, sir.

Q. Of any—you heard all of the evidence yesterday, did you not?

A. Yes, sir.

Q. That has been introduced in the case. Did she ever have, or complain (strike out the word "have") did she complain of any of the troubles which have been detailed here by witnesses, prior to this accident and injury?

A. No, sir.

Q. The little boy that was with her—her little boy, did he ever drive horses away from home?

MR. TORREY.

I object to the question.

THE COURT.

I don't see any importance in that.

NO CROSS EXAMINATION.

MRS. MARY ELLEN FLANNELLY, Plaintiff, recalled.

RE DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mrs. Flannelly, had you any rheumatism or rheumatic pains or troubles, prior to the injury you received in this accident?

A. Before the injury?

Q Yes?

A. No sir, I never had rheumatism in my life. I don't know what the effects of it is.

Q. Did you have any womb trouble?

A. No, sir, never.

Q. Was there any trouble with the ovaries?

A. Never had no trouble. and no complaint of any kind, as I know of.

Q. Were you ever subjected to any extreme exposure or unusual exposures, outside, prior to this injury.

MR. TORREY

We object to the question as very leading and very vague.

MR. SHERWOOD.

I withdraw the question.

Q. Do you know of any cause for any of your troubles, your present troubles, other than the injury received in this accident?

A. No sir, I do not—nothing before the 30th day of July, I was in good health.

CROSS EXAMINATION

MR. TORREY.

Q. Whatever might be the cause, is it not a fact that the motive of your apparent condition is, the prospect of a large recovery of damages?

MR. SHERWOOD.

I object.

THE COURT.

It seems to me that is hardly a proper question.

C. H. MAHON, Sworn for Plaintiff.

DIRECT EXAMINATION.

MR. SHERWOOD.

Q. Mr Mahon, how old a man are you?

A. Seventy next birthday.

Q. For how many years have you known the crossing where this accident occurred.

THE COURT.

What do you propose to prove now?

MR SHERWOOD.

I am going to just touch on the usual and customary place of stopping, and then I propose asking the witness whether there is any general custom to get out, and go ahead, or lead horses across the track, or anything of that character at that crossing.

MR. TORREY.

We object to this as an offer, your honor, as being repetition, cumulative, and the latter part of it is wholly immaterial as evidence of custom cannot control the duty.

THE COURT

Do you propose to show such a custom at this crossing, and to get out and lead horses?

MR. SHERWOOD.

No—I was going to say, that there was no general custom to do such things.

THE COURT

That would be of no value here.

MR. SHERWOOD,

Your honor sustains the latter part of the offer?

THE COURT

Yes.

MR. SHERWOOD.

Q. What is the usual and customary place to stop, look and listen, before driving upon that track, in the way Mrs. Flannelly is said to have approached?

A. Well I usually stop there from 12 to 25 feet; sometimes a little more, perhaps.

Q. What is your business, Mr. Mahon?

A. Life Insurauce, at the present time.

Q. Have you any objections to the mortality tables?

MR. TORREY.

No.

MR. SHERWOOD.

Q Have you the mortality tables, showing the probable life of insurance risks?

A. Yes.

Q. What table, have you?

A. The American Tables.

Q. Just turn to it, please? What page?

A. Page 161.

Q. What class of people does that table cover?

A. All persons, male and female of average ordinary good health.

Q. Would a woman such as Mrs. Flannelly was described to be, before her injury, be included?

MR. TORREY.

We object to that.

MR. SHERWOOD.

Q. What is the probable expectancy of life of a woman of sound, ordinary health, at the age of 43 years?

MR. TORREY.

Let me see the book; if you are going to testify from the book, we don't need anything from the witness.

MR. TORREY.

We don't object.

THE COURT.

Q. What is the expectancy?

A. Twenty-six years.

MR. SHERWOOD.

I would like to offer the rule by which it is composed or computed, it you have no objection.

MR. TORREY.

We certainly object. It doesn't say anything in that book about the class of lives from which the table is made up, whether from males or females, or whether it is of selected lives.

THE COURT.

You don't object to the testimony that has been given that according to this mortality table the expectancy of life at 43 is 26 years?

MR. TORREY.

I don't object to the testimony that the

American Table of Expectancy of life shows 26 years as the expectancy of a person 43 years old.

MR. TORREY.

What book is that?

A. The Morgan Mortality table.

Q. That is all there is in the book—what is the book?

A. The terms,

THE COURT.

Q. It is a book you use in taking life insurance?

A. Yes.

MR. TORREY

Q. Was it used by any particular Life Insurance Co?

A. Yes, the Equitable Life Insurance Company.

Q. Does the book anywhere state by what means that Morgan Table is made up—whether the lives were selected. Does the book show.

A. This is the explanation here.

Q. This explanation here is all the explanation there is there? That doesn't state what lives were selected or who made the selection at all? Have you the Carlisle Table in there:

A. No, sir.

Q. No other table of expectancy in that book.

A. No, sir, not in this book. There is a Carlisle Table—an English Table, but it is not in this book.

Q. You have driven over this crossing, have you? Very often?

A. Yes, sir.

Q. And from the point you speak of, about 25 feet on the east side, from the first track, a long and unobstructed view is obtained, if there are no cars on the track, both north and south?

A. Oh, yes.

MR. SHERWOOD.

I now offer in evidence a bound pamphlet, produced by the defendant upon request for a time table in use on the day of the accident, labelled on the outside "The Delaware and Hudson Company, Pennsylvania Division, Time Table No. 40, effective Sunday, June 23, 1907, at 12:1 a. m., superceding Time Table No. 39, dated November 23, 1906, for the government and information of employees only. C. S. Sims Sd. V. P." Marked Plaintiffs' Exhibit No. 1.

I also offer in evidence Plaintiffs' map, and ask to have it marked as Plaintiffs' Exhibit No. 2.

MR. TORREY.

What is the purpose of offering the book?

MR. SHERWOOD.

To show the number of passenger trains, scheduled trains, that run daily across this crossing of the D. and H. Co., and of the Jersey Central upon the D. & H. Tracks; also to show the distances, and time of scheduled times of running, and the different names of villages and stations along the way.

MR. TORREY.

No objection at all.

PLAINTIFF RESTS.

THE COURT.

Open your defense.

MR. TORREY.

If the court please, we move at this time for a compulsory non-suit, upon two grounds:

1st. That no negligence has been shown on the part of the defendant, and

2nd. That the evidence of the plaintiff reveals contributory negligence on her part, which would bar a recovery.

THE COURT:

I will over-rule the motion. Note an exception for the defendant.

DEFENDANT'S EVIDENCE.

(Defense outlined to jury by Mr. Will Torrey.)

W. M. MANCHESTER, Sworn for Defendant.

DIRECT EXAMINATION.

MR. TORREY.

Q. What is your business Mr. Manchester?

A. Photographer.

Q. Doing business as a photographer in Scranton?

A. No, sir I am working.

Q. You made some photographs at Smithville crossing, below Avoca, at a crossing below Avoca?

A. Yes sir.

MR. SHERWOOD

We have no objections to those photographs: you need not go any further.

THE COURT.

You admit that they correctly represent the situation at that point?

MR. SHERWOOD.

Not at the time of the accident, no, not as it was at the time of the accident. I suppose they correctly represent the things as were when he took them.

THE COURT.

And you agree that they may be admitted in evidence?

MR. SHERWOOD.

They may be admitted for the purpose of such argument as they make.

(Photographs marked "Defendant's Exhibits 1 to 6 inclusive.

MR. TORREY.

Q. When were these photographs taken, Mr. Manchester?

A. March 10th, 1908.

Q. I show you Photograph No. 1, can you tell us from what point that is taken—I don't know whether you have any memorandum or not.

A. It was taken from the centre of this track (indicating). I don't know whether it is north or south bound, to be sure, but it is the centre of the tracks; and the centre of the road track (the easterly track)—centre of first track, and centre of the highway on the planks, looking south-west looking directly down the track.

Q. Photograph No. 2, from what point was that taken?

A. Well, it was taken from a point in the roadway to the east of the track, showing where the

former picture was taken from, and also the surroundings, just down the street a little.

MR. SHERWOOD.

Q. You mean on the Pittston side of the track —farther from here?

THE COURT

I think you had better allow defendant's counsel to bring out those facts.

A. I should think it would be nearer Scranton; it is on the eastern side of the track, and in the middle or nearly I should think in the middle of the road way-

MR. TORREY.

Q. Looking in what direction?

A. Perhaps nearly west, as I recollect—looking across the tracks.

Q. What would you say about the distance from the track?

A. Fifty feet perhaps; 40 or 50 feet,—I didn't notice that closely.

Q. Number 3, from what point is that taken?

A. That is taken from a point nearer Scranton, looking down the track, at the crossing, and showing the roadway, both the roadway and the crossing.

Q. No. 4; from what point is that taken?

A. That is taken, again in the same roadway, not far from the position of No. 2 was not far from the same position.

MR. SHERWOOD:

Q. Looking the same way?

A. Practically, yes.

MR. TORREY.

Q. No. 5?

A. I don't know what to characterize this track—

Q. That is the Lehigh Valley track.

A. It was taken a little to the left then of this Lehigh Valley track, and at a point nearer Scranton, from the crossing.

Q. Looking down south?

A. Looking down south, yes.

Q. No. 6?

A. This is taken from the road way again, at the east of the tracks, showing the crossing, and to the south-west slightly.

Q. Who was with you when these pictures were taken?

A. Mr. Crippen, of the D. & H., and Mr. Dershimer.

Q. The engineer?

A. Yes, there were some others, one or two, whose names I don't know.

Q. While you were taking numbers 1, 4 and 6, a freight train was stationed upon the 3rd track, and an engine on the second track, or north bound track—that is a fact, is it?

A. Yes, sir.

Q. And Mr. Dershimer was there to measure the distances?

A. Yes sir.

MR. TORREY.

I offer these photographs as exhibits in evidence, and there is no objection, I understand.

CROSS EXAMINATION.

MR. SHERWOOD.

Q. How long were you upon the ground at the time of taking these pictures?

THE COURT.

That is not material, as long as you are not going to object to the pictures.

MR. SHERWOOD.

Yes it is material; I purpose to bring out from the witness that they planned to put these trains in position to have the pictures taken.

A. I should think an hour.

MR. SHERWOOD.

Q. Now, while taking the pictures, who would direct you where to take it from?

A. Mr. Crippen.

Q. He is the detective for the company?

MR. TORREY:

We object to the question. Mr. Crippen is the claim-agent for the Delaware and Hudson Company, for the Pennsylvania Division.

MR. SHERWOOD.

Q. Would you take a picture and then wait until the trains were in a certain position, and then they would tell you to take another picture?

A. Yes, sir.

Q. They were taken under the direction of Mr. Crippen, that is this gentleman here?

A. Yes.

Q. And you knew that there was a law-suit pending, and were to be used in the trial of the case?

A. I heard so.

Q. The trains stopped in those positions?

A. Yes.

Q. You have no photograph of a moving train?

A. No.

Q. You have no photograph showing any train upon the first track, that is, the track nearest the more built-up portion of Dupont?

THE COURT.

On the east side, that is the first track is the most easterly track.

MR. SHERWOOD.

The first track that this woman is said to have approached.

A. I am not sure.

MR. TORREY

There is no such picture.

MR. SHERWOOD.

Q. You have no photograph showing a train on that track?

A. I think not.

Q. They didn't run any by there into that track?

A. There was a train past, I think.

Q. Going south—to Pittston?

A. No, going towards Scranton.

Q. Why didn't you snap that?

A. I wasn't directed to.

A. F. DERSHIMER, Sworn for Defendant.

DIRECT EXAMINATION

MR. TORREY.

Q. You are a civil engineer, Mr. Dershimer?

A. Yes, sir.

Q. In the employ of the defendant company?

A. Yes, sir.

MR. SHERWOOD.

Let me see your map, please, it may save time.

MR. TORREY.

Q. Mr. Dershimer, you made surveys for a map of the railroad and the crossing, at what is known as the Smithville crossing, below Avoca, and the neighborhood, did you?

A. Yes sir I made surveys, and I have had surveys made under my direction—of the data from which this map was made.

Q. Was your own survey, or surveys made under your direction?

A. Yes, sir.

Q. As to what is now the north bound track, and which is the most easterly track, is that located upon your map, as the tracks are now, or as they were before?

A. As they were at the time of the accident.

Q. What do you call the east bound track, as it appears upon this map?

A. The east bound, the slow track, we call the 4th track—I mean the most easterly track is the 4th track.

Q, Does your map show—

A. It was then.

Q. What did you call it then?

A. The 4th track.

Q. You used some other word for it now—slow track, did you say?

A. Slow track.

Q. Did you see the switch from the middle track to what you call the 4th track?

A. You mean the first north bound main?

Q. Yes?

A. Yes.

Q. That is a little south—

THE COURT.

That most easterly track was the switch track at that time?

MR. TORREY.

No, your honor, it was what was called the No. 4 track or the slow north bound track at that time—for slow traffic. That will be fully explained by other witnesses.

Q. Now, Mr. Dershimer, there is a red spot there on the map, right in front of one of those houses, does that in any way connect with any of the photographs – you were present when the photographs were taken?

A. Yes sir.

Q. Did you locate any points upon the map with reference to the photographs?

A. Yes, sir.

Q. What does the red spot represent?

A. There was a lady stood at that point

Q. It is the woman who appears in photograph No. 5, nearest to the camera?

A. Yes, sir.

Q. Now, have you located on that map the points where the locomotive stood, when photographs 1, 4 and 6 were taken—if they are all the same—perhaps they are not all the same—(they don't agree with my numbers)?

A. Yes, sir.

Q. Have you located the position of the locomotive as it appears in No. 4? (Your old No. 1)

A. Yes, sir.

Q. How far is it from the crossing?

A You mean from the center of the crossing?

Q. Yes?

A. Practically 400 feet.

Q. Have you located on your map, and if so by what, the spot where the camera was when photograph No. 4 was taken? (It would be No. 1 on your map)

A. Yes, sir, by a white spot, and on the blue print, and marked No. 1.

Q And the same mark represents Photograph No. 2?

A. Yes, sir.

Q. Now how far was that from the most easterly rail of the most easterly track?

A. About 12 feet.

MR. SHERWOOD.

Q. Which way?

A. East of the east rail.

MR. TORREY.

Q. And about the middle of the road?

A. Yes, sir.

Q. In Photograph No. 2. there is represented a locomotive and a train, about side by side, can you tell us from your map how far they are from the crossing?

A. The caboose is about 415 feet south of the crossing, and the engine about 450 feet.

Q. How is it represented on the map?

A. The engine is represented by No. 2 E, and caboose by No. 2 C.

Q. You have all those distances, I guess, on your map, haven't you?

A. We haven't the distance; we have the No. 1 for the location of the caboose, as shown in photograph No. 1; No. 2 is the engine in Photograph No. 2, etc.

Q. Now I call your attention to photograph, which you have marked No. 3, and which is Exhibit No. 1; what is the distance from the crossing to the locomotive shown in that picture, and how is it represented on your map?

A. About 380 feet.

Q. How is it represented on the map?

A. The engine?

Q. Yes?

A. By No. 3 E.

Q. And the engine in your photograph No. 4, Exhibit No. 6, what distance is that from the crossing, and how is it represented on your map?

A. About 520 feet, and by No. 4 E.

Q. And how is the position of the camera, when that photograph was taken, represented on your map?

A. By a white spot, on the blue print, a white dot about the centre of the roadway east of the tracks, and marked No. 4.

Q. About how far is it from the most easterly track?

A. From the easterly rail?

Q. From the easterly rail, yes?

A. About 16 feet.

Q. And about how far is it from the middle of the highway, as it goes on the crossing?

MR. SHERWOOD.

The side rail.

A. About 40 feet from the easterly rail in the center of the crossing.

MR. TORREY.

Q. Your photograph No. 5, Exhibit No. 3, how is the location of your camera shown on the map?

A. By No. 5, in the center of the north track, north of the crossing.

Q. And your photograph No. 6, Exhibit No. 5, where is the location of the camera shown on your map for that?

A. Between the Lehigh Valley and the south bound main, and marked No. 6. There is a white spot or dot.

MR. SHERWOOD.

Q. Is there a mark at the spot?

A. Yes sir.

(Blue print marked Defendant's Exhibit No. 7).

MR. TORREY.

Q. Mr. Dershimer, did you draw a line of vision upon that map from a point just to the east of the railroad on the highway for the purpose of showing how long an unobstructed view there was of the tracks, with no cars or trains upon them?

A. It was done under my direction.

Q. Can you tell us the distance—you made the measurements didn't you?

A. Yes, sir. 2300 feet.

Q. It is marked by the red line, called "Line of Vision" is it not?

A. Yes, sir.

Q. And 2300 feet carries you to what point?

A. What is known as the Dupont crossing.

Q. It is marked on your map "Front Street"

A. Yes, also "Dupont Crossing."

Q. A little north of that Front street there is some lines over the railroad, what does that represent?

A. I believe it is the Traction Company's Viaduct, for street cars.

Q. It is so marked on your map?

A. Yes, sir.

Q. Will you deduct from the 2300 feet, and tell us how far that is from the Smithville crossing?

A. About 1950 feet.

Q. And it shows in some of the photographs, does it not,—that viaduct?

MR. SHERWOOD.

I object. (Objection withdrawn)

A. Yes sir.

MR. TORREY.

It shows in your No. 5, Exhibit No. 3?

A. Our No. 5, yes sir.

Q. And your number 6, (Exhibit No. 5) it shows, does it not?

A. Yes sir.

Q. "Bridge over the railroad in the distance?"

A. Yes, sir.

Q. What are the buildings shown to the west of the track there?

A. Dwellings.

CROSS EXAMINATION

MR. SHERWOOD.

Q. That line of vision, Mr. Dershimer, that you have on your map the red line, extending from a point how far from the crossing back about how many feet?

A. About 40 feet—just one minute until I scale it—about 40 feet.

Q. 2300 feet to the Dupont crossing?

A. Yes, sir.

Q. Supposing there was a train between those two points, on any one of those three tracks of the defendant company, would a part of the opportunity to view be cut off?

A. I think it would.

Q. If there was a train upon the first track, nearest the approach to that track?

A. What do you mean by the first track now?

Q. I mean the first track nearest as you approach from that same side, from that point, and extending down around the curve here, how much view could any traveler get in that instance?

A. I don't like the way that is put—I will tell you the reason why—you are speaking of the westerly track, or the easterly track?

Q. I am not skilled like you are on these tracks: I am talking about the first track as the traveler approaches?

THE COURT:

It is the first track she came to, and you will have to call it that, please.

MR. SHERWOOD.

Q. Now, I am asking you if there was a train drawing down here, and the hind end of that train was somewhere between the crossing and the little shanty that stood there before, how much view could one get down all that 2300 feet—it would be pretty well cut off, wouldn't it?

A. I understand, going south on that?

Q. Either going, or standing, if there is a train in there at all?

A. If it was standing, but not going south, it would be impossible for a train to go south on that track.

Q. I am talking about the view, in that case?

A. If it was there, yes, it would be cut off some.

Q. We will say that there is a train on the 3rd track, a freight train, or of high coal cars on the 3rd track, with the traveler approaching from the same way, how much view then would that train cut off—he could see down to this point, could he not?

A. He could see farther than that.

Q. Supposing the hind end of the train was up here (indicating on map)?

A. That point, think he ought to see 700 feet.

Q. That point referred to is a point where the red line crosses the last rail of the 3rd track, when I said "that point."

A. You asked me how far I could see. I said about 700 feet.

Q. Well, if there was a train, a passenger train, coming up on the second track, or the middle track the middle of the three tracks, and a train on each side of it, and a passenger approached at that point —train each side of it—between the crossing and the Dupont crossing, the crossing where the accident happened and Dupont crossing, how far could your approaching traveler see it before going out upon the tracks?

A. That depends upon how close he was to the crossing.

Q. We will say that the hind end of the train on the first track was down in the neighborhood of where the little shanty was you know where the shanty was before it was moved?

A. You mean from point 4, this point here?

Q. Yes?

A. It is hard work to tell without having a rule or straight-edge to lay down here?

Q. You came here prepared to be a witness, didn't you?

MR. TORREY.

I object to the question.

A. To testify to the accuracy of this map, yes.

MR. SHERWOOD.

Q. Will you give it as best you can there?

A. I should say somewheres about 400 feet.

Q. When was this map, made?

A. I could not give you the exact date of it—the survey has been made for it, some time I think in 1905

Q. In 1905?

A. Yes sir.

Q. You are in the employ of the company?

A. Yes, sir.

Q. Were you there on the ground the day these photographs were taken?

A. Yes, sir.

Q. And the trains were run up there, and stopped at points, according to the direction of Mr. Crippen?

A. Yes, sir

Q. And then the photographs snapped?

Q. Yes.

Q. And then you took the measurements?

A. Yes, sir.

Q. And some trains went by there which were not snapped?

A. I could not be sure of that.

Q. Do you recall a train on the first track?

A. I could not, sir, I don't remember it.

Q. You have no photograph of that. You were there how long?

THE COURT

About an hour, I think he said.

MR. SHERWOOD

Q. Did you say about an hour?

A. No, sir, I could not say exactly, I should judge somewhere around that time.

Q. You were there a longer time?

A. I don't know.

THE COURT.

It doesn't matter.

MR. SHERWOOD.

Yes it does matter, if it please your honor.

Q. Weren't there passengers trains every hour.

A. The photographer got but one, going north; I believe he said so.

Q. You say those are the only two?

A. The only one that I remember; I would not be positive, I was doing my work.

MR. TORREY.

We offer the map in evidence.

Q. Can you scale for us the extent of unobstructed view which you get, up or down, going on the crossing, coming from the east toward the north on the tracks—can you tell us that?

A. Give me that question again?

Q. How much unobstructed view is there to the north of that crossing, just before you reach it?

A. I should say from 900 to 1000 feet.

Q. You were down on this crossing, and about it, when the jury were there on Tuesday morning, were you not?

A. Yesterday morning, yes sir.

Q. How long were you there?

A. Well I should judge close on to 45 minutes, to an hour, I could not say exactly, but near that.

Q. I want to ask you this question; did you make any observation during the time you were there as to the number of teams, if any, that crossed that crossing?

MR. SHERWOOD.

We object to this.

THE COURT.

What is the materiality of that?

MR. TORREY:

To show the amount of the use of the crossing.

THE COURT.

It is somewhat remote, but I will allow it. How many teams did you see go across, while you were there, the thirty or forty minutes, yesterday morning?

A. There wasn't any went across the tracks, there was one waiting, ready to go across the track, and waited until we got on the passenger train, coming north.

NO CROSS EXAMINATION.

DR REED BURNS, Sworn for Defendant.

DIRECT EXAMINATION

MR. TORREY.

Q. Doctor Burns, what is your age?

A. I am 63.

Q. Are you a physician?

A. Yes sir.

Q. And surgeon?

A. Yes.

Q. How long have you practiced?

A. Forty-one years.

Q. How much of the time in the City of Scranton?

A. Will be thirteen, next January.

Q. Prior to that where were you practicing?

A. In Honesdale, and a little town near Honesdale, Bethany.

Q. You have had some experience, I presume, not only in private practice, but hospital practice?

A. Yes.

Q. To what extent—how many years?

A. From 1867 to '88 I did general practice; from '88 until '95 I did surgery and general practice; the surgery was gradually increasing, and the medical practice growing less, since 1895 I have practiced and done nothing but surgery, except in consultation work.

Q. You have a private hospital of your own here in Scranton?

A. Yes, sir.

Q. Of what capacity?

A. We have nineteen beds.

Q. Doctor, you made an examination of the plaintiff, Mrs. Flannelly?

A. Yes, sir.

Q. You went there on behalf of the company?

A. I was asked to go by the officials of the Delaware & Hudson Co

Q. Where was that examination made, and when?

A. In Wilkes-Barre, at, I think, Dr. Butler's office.

Q. When?

A. It is four weeks ago.

Q. Who were present besides yourself, in the examination?

A. Doctor Butler, and her husband, and the attorney for the plaintiff, Mr. Sherwood.

Q. Did you ask the plaintiff, any questions, as to her ailments?

A. I did, yes, sir.

Q. What did she represent as being the trouble from which she was suffering?

A. She claimed to have been injured, I think, last September, the last of September, by being struck by an engine, while crossing the D. & H. tracks.

Q. Did she say she was struck by the engine?

A. That was my understanding, that she said so, and that she was confined to her bed about two months; that since the injury her neck had been crooked; she had had absolutely no use of her left arm, so far as—

Q. Did she say her left arm?

A. I am not sure whether she said her left arm or not—so far as I was concerned; and that she had some pain about the neck and shoulders. That was practically all that she complained of. Some mention was made of distress down about the ovaries, but that wasn't dwelt upon as of much account.

Q. Will you tell us what she said about that, as near as you can?

A. Very little said about her ovarian trouble, and uterine trouble, and about all she said about her neck and shoulder was that her head was on one side, and her shoulder elevated, and she could not use her left arm.

Q. Did she make any mention of her lungs?

A. No, sir.

Q. Did Dr. Butler mention anything of that kind?

A. No, sir.

Q. Did she make mention of any trouble with her heart?

A. No, sir.

Q. Did Dr. Butler mention anything of that kind?

A. Not to my recollection.

Q. What, if anything, was said about the curvature of the spine?

A. Her neck and shoulders were exposed, on the back.

Q. What was said? I am not getting to the examination yet.

A. I was simply asked to look at her neck and spine.

Q. Was anything said by either her, or Dr. Butler, about her eye sight being defective?

A. I don't remember that there was.

Q. Was anything said by either of them about her womb being tipped back or retroverted?

A. There was very little attention—my attention was called very—well, no, I could not say it was called in a slight way there was a very little complaint about uterine or ovarian troubles, although I made an examination of the pelvic organs.

Q. Was anything said about chronic constipation, by either of them?

A. I think there was something said about it.

Q. Now describe to us what examination you made, doctor?

A. I examined the pelvic organs, as well as I

could—the uterus, the ovaries. and I examined the neck.

Q. Well, as you go along, please tell us the results of your examination of the uterus?

A. I found—there was very little to be found in the pelvis, that was abnormal: all women who have a large number of children are more or less injured by child-birth; so far as this is concerned, she was better off than the average woman who has had 10 children. I don't think I found the uterus retroverted—I am sure I did not.

Q. You made such an examination as would have revealed the retroversion if it had existed?

A. Yes, that is very easily ascertained. I found no enlargement of the ovaries, although there was some complaint of pain in the left ovary, in that region.

Q What would be your opinion as to whether the ovary was diseased by reason of any bruise or blow, or fall?

A. The ovaries cannot be injured by a bruise or a blow, because they are so situated that the pelvic – a bony wall all around them—that unless you have a very serious injury with a fracture of the bones, the ovaries cannot be injured: by bruising, it is impossible; unless there is a tumor pressed down into the pelvic or something of that kind, which this patient has not got.

Q. Whether in your opinion there was any diseased condition of the ovaries, or either of them, which would have been the result of a mis-carriage?

A. Following the mis-carriage, if sepsis occurs.

Q. By that you mean blood poison?

A. Well not necessarily if the cavity of the uterus becomes the seat of certain microbes which

produce inflammatiou, which travel out of the fallopian tube—That is the only way we get ovarian trouble, following miscarriage; There was nothing to show that there was such a condition. When that occurs there is usually adhesions and limitation of motion to the uterus; there was nothing that I could find of anything of that kind.

Q. Now that practically exhausts your examination of the pelvic organs?

A. Yes.

Q What did you next examine?

A. I examined her neck and shoulder, and the two arms. First, with reference to her neck: Her head leans towards her left shoulder, and the left shoulder was elevated towards the head; a certain muscle that runs from the skull close to the ear down to the collar bone and presses upon the sternum, which is usually contracted in wry-neck—practically always, was apparently normal; soft; when I put the head up in position, it wasn't drawn out as it is where we have a contracted muscle. The muscles further back in the neck were apparently more firm and rigid, and those are muscles that run up to the spine attached to the back of the head in such a way that when they are contracted they throw the head backward those muscles were more rigid they were not all the while of the same degree of rigidity, some times more rigid than others, and when I pushed her head up in position, there was no complaint of pain, such as there is usually, or always pretty nearly where there is an actual contraction and shortening of muscles from disease.

Q. How about he shoulder?

A. I found nothing wrong with the shoulder, except that it was pulled up; and that was pulled

up by the muscles in the back of the neck, on the side of the back of the neck we have muscles on each side of the back of the neck that balance each other; on the other side they are attached, some of them, to the shoulder and shoulder blade, and attached correspondingly on the other side.

Q. Whether in your opinion the condition of her neck, as you saw it then, the neck and shoulder, were due to any physical disorganization or disease?

A. I don't believe it was. The two arms were of equal size; muscles firm, plump, that is, the arms above the elbow; below the elbow they were of equal size, and the muscles firm; and her left hand, the palm of the hand gave every evidence that she was doing work, and had done, up to that time.

Q. What would have been the condition of her hands, if she had been an invalid for five or six months, doctor?

A. If she hadn't done any work for five or six months, the skin on the palm of the hand is always soft and free from callous, and the muscles that are brought into play with work, with five months rest become soft, and they shrink up in size.

Q. Did you find that condition of her hands?

A. No, sir, just the opposite condition; her hands were equal, and the size of the arms equal, and the muscles firm.

Q. And the hands showed evidence of work?

A. Evidence of work.

Q. Did she maintain that rigid position of her head and shoulder during the entire examination?

A. No, sir; sometimes it was more than others; and when she got up from the table, on which I had made the examination of the uterus and ovaries, and went to her chair at the side of the room

her back was towards me, and her head was perfectly straight and her two shoulders were even; but the wry-neck reappeared after she sat down a short time.

Q. Could that be possible in a case of genuine wry-neck?

A. I don't think so.

Q. You are, I presume, somewhat familiar with the disease called torticollis?

A. Yes sir, somewhat.

Q. How many cases would you say you had observed?

A. I have no means of knowing, but I see a case or two sometimes every year.

Q Are there different varieties of that disease?

A. There is crooked neck—from different causes.

Q. What are some of those causes?

A. There is a congenital wry-neck; born at birth, that is, the trouble dates at birth—usually from injury to the muscles of the neck during delivery; then there is a wry-neck that we call spasmodic wry-neck, in which the muscles of the neck are always contracting, and the head making all sorts of motions; it is a most distressing form, not common, but you occasionally see it—that we call "spasmodic wry-neck." Then there is a wry-neck that may be due to diseases of the bones of the neck and upper part of the trunk, that is the spinal column; and another form which we get almost invarably in children that is believed to be due to some rheumatic inflammation of the muscle. That is the the most common form of wry-neck.

Q. Whether you ever saw a case of genuine

wry-neck associated with the elevation of the shoulder?

A. I never have.

Q. Whether in your opinion Mrs. Flannelly is suffering from torticollis, of any of the varieties that you have mentioned?

A. I don't believe she is.

Q. Can you give us some reasons for your opinion, other than you have already given?

A. Torticollis or wry-neck that comes from disease of the vertebra, fixes the head; the muscles connected with the head, and the bones in the neck becomes rigid, they fix the bones rigidly, because the movement is painful. A patient suffering from that kind of trouble, when they turn to look in different directions, turn their body entirely, so as not to turn the head and neck, because it is painful; they never bow, and shake their head "yes" and "no" because that is painful.

Q. Have you seen the plaintiff do that?

A Yes. We can shut out disease of the bones in the neck, in this case, entirely absolutely. We can shut out spasmodic wry-neck, second, or one of the varieties, because there is nothing of that kind. You can shut out the congenital wry-neck because she was not born with it; the other variety, an inflammatory condition of the muscles is due to something like rheumatism—almost always in childhood, when we find that condition this muscle (indicating) that runs downs to the top of the sternum and collar bone called the sterno-cleido-mastoid, always when we try to straighten the head stands out, and is rigid and feels like a cort under the skin. A patient in that condition could not get up from the table and sit down with the head straight, as this patient did.

Q. If it were testified by the attending physician of this woman that not until eight weeks or more after the accident did he observe anything like wry-neck, what would be your opinion as to the possibility of this condition of the neck having resulted from the injury.

MR. SHERWOOD

I object.

THE COURT

Why?

MR. SHERWOOD.

Because he cannot base his opinion upon a feature from the evidence of any one witness; furthermore that does not state the exact facts.

MR. TORREY.

I will change the question.

Q. Doctor, whether in your opinion, the condition of the neck and shoulder of which this plaintiff complains, could be the result of having been thrown or jumping out of a wagon, in July, 1907?

A. I don't believe she has a wry-neck—the genuine thing; and therefore it could not be produced by fright, because it don't exist or from an injury.

Q. Whether or not wry-neck is, or is not, somewhat easily simulated?

A. Very.

Q. Have you ever known of a simulated case?

A. Yes sir.

MR. SHERWOOD.

I object to that, and ask to have that answer stricken out.

THE COURT.

I don't think we can go into that. Of course he can state that it is easily simulated.

A. I want to add to that answer: That to get all the conditions and symptoms perfect is a very difficult thing; but the apparent comdition of a wryneck is very easily put on. Anybody can carry the head on one side, stick their chin over to the other side; but it is not easy to produce the contraction of the muscles which produce the genuine thing, or the diseased vertebra.

Q. Now with reference to the alleged curvature of the spine?

A. The spine was bent forward when she stood up, and the head drooped, which exaggerated the forward curvature; there was a little bit of lateral curvature, a very little; a convex or rounded surface toward the right. There was no wasting of muscle, and no fixation of bones, or any angular curvature such as arise from disease of the bones. This slight lateral curvature is present in almost all people; there are very few who have an absolutely straight back; there are very few who have their shoulders exactly horizontal—one shoulder a little higher than the other; and I can say that, in my opinion, there is absolutely no disease of this woman's spinal column.

Q. What did you find to be her condition as to her nervous organization, doctor?

A. Well, while I was examining her, she was excited, and apparently in a nervous condition, and after I got through she sat down in a chair, as I stated, and did something that looked, on the surface, like a fainting spell, but her lips retained

their natural color, and her face had natural color, and I could see that it was not faintness; she was conscious all the while, and her husband went to her to comfort her. But, she had gone through a somewhat anxious period—25 or 30 minutes perhaps.

Q. Did you try her pulse, doctor, at any time during that examination?

A. It was somewhat faster than the average, but that always is when a patient is excited and in a nervous condition.

Q. How about its strength?

A. There was nothing that I noticed—nothing that attracted my attention as being out of the way in any way in regard to her.

Q. Whether in your opinion, doctor, this woman is suffering from any disease of the ovaries, or lungs, or other physical impairment which is the result of an accident?

A. It is difficult to say just how much injury a certain amount of fright can produce; she is a woman who has born 10 children, I understand, that is enough to exhaust most women, there is nothing that I could see, or find about her to indicate a lesion or disease due to injury. Now, the nervous symptoms; where there is a question of litigation, and the patient seen by attorneys and physicians, those symptoms are always aggravated in those cases by the conditions which surround them, their prospective litigation. I have seen a great many people who have been injured, where there was no question of damages, they all get up as a rule—almost invariably get up and go to work after a time unless the injury is so great as to prevent it, and they have none of these nervous symptoms where there is a question of damage and litigation and visits by attorneys and

doctors examining them; they all have these symptoms—pretty nearly all the cases that bring suit that I have seen; and they keep up until the case is settled; so it is pretty difficult to tell just what does the most harm,

Q. I am speaking of the physical injury—whether she shows any result of any physical blow or injury of that kind?

A. No, sir.

CROSS EXAMINATION

MR. SHERWOOD.

Q. You say, all the cases that you have seen?

A. Yes.

Q. Where there is litigation, they get in that shape?

A. Yes they do.

Q. Where they are seen by doctors and attorneys?

A. Yes.

Q. You have been on the side of plaintiffs, in cases, have you?

A. When I was younger, yes, occasionally now, but very seldom.

Q. They got in that shape when you were in the case?

A. Yes; and at first I thought it was due to the injury, but I learned better.

Q. And that is the reason now why you are on the side of the other party?

A. It is partly, because my testimony is not wanted by the side that brings the suit, as a rule.

Q. Well, a person injured in connection with a shake-up—a severe shake-up, throwing a person sufficiently that immediately following it, they lose

voice for quite a time, while immediately following it they are made apparently crazy, the pulling of hair—person's own hair, the person injured, and right at the scene of the accident, with a large bruise upon the side of the head, near the top, and just back of the ear, and a large bruise over the ovaries, and on the side, and extending clear down across the thigh, and an actual bruised condition of those parts of the body— a shake-up, sufficient I say, to make that person scream and pull her own hair, and unable to recognize her own family the same night, and for some time following,—from which a miscarriage follows; and she lays in bed sick and helpless for at least six weeks,—would you not say that all of a persons physique might go to wreck and rack from such a condition?

A. I would have to know more about it. I never saw a patient who was injured pulling their own hair unless they were in a condition which we call hysteria, and did it for effect.

Q. That is all put on?

A. I have seen a good deal of putting on, by patients.

Q. Do they do it for effect?

A. Yes.

Q. Do you mean at the moment of the accident?

A. Do it for the effect on those who are looking on. I never saw it done when there was no one looking on—there is no fun in it.

Q You would say, if this woman has been so helpless that she has had to be washed and cared for, that is all put on, would you?

A. No, I say the hair-pulling is put on for effect.

Q. That is all you say is put on, is it?

A. I could not tell, I wasn't there.

Q. Is there any animal living, sir, that if you strike it on the head, it will not be apparently momentarily crazy, if you strike it a hard knock, and don't strike it too hard?

A. The first effect of a blow on the head is unconsciousness, if the blow is enough to produce that effect. A small blow doesn't make them crazy; it may make them angry, but insanity is not produced immediately in that way.

Q. You say that the brain cannot be so disorganized as to drive a person momentarily insane?

A. At the moment of injury, no; we will say 10 or 15 minutes afterwards?

Q. That is very unusual?

A. Well I have never seen a great many injuries.

Q. Accordingly, therefore, it never happened, is that your idea?

A. My idea is that it is very rare, it would be the extreme exception, and not the probability.

Q. Then you will admit that there might be one exception?

A. Well, I have not estimated them.

Q. Might a person be apparently crazy, in the evening following the accident, which happened at 11 o'clock—from the evening following, so that they didn't recognize their own family?

A. A sufficient amount of concussion of the brain might be followed by disturbance hours afterwards.

Q. A brain is like a pot of soft matter encased in the skull about the density of mush, isn't it?

A. Some are, but others are not (laughter).

Q. We will take mine for instance; I suppose

that you put at about the density of mush—it is not hard, is it?

A. It is not very firm, no.

Q. And anything which gives it a quick jar or a sudden shaking, may disturb it, might it not?

A. Yes.

Q. And that a blow on one side might rupture a little blood vessel, or some portion of the brain on the other side?

A. Some blow might produce an injury on the opposite side.

Q. And that might produce insanity, without a specific connection, might it not?

A. It generally produces signs of blood-clot, stupor, some form of paralysis.

Q. Failure to notice friends, is that one?

A. If it was sufficiently extreme.

Q. Would you look for a pretty extreme one, if a train running at a mile a minute, ran into a wagon, and hurled them to the ground—or half that fast?

A. It would depend on how they were hit, and whether they jumped out of the wagon, and was hit at all or not

Q. They have been telling you about the jump?

A. I have heard something about it. It would make a big difference how they got out of the wagon, whether they were thrown in the air fifteen or twenty feet and landed on a rock, or jumped and landed where the ground was soft.

Q. Suppose they struck a plank, do you call that soft?

A. No.

Q. Or a track rail, you don't call that track soft?

A. No.

Q. Now any disturbance of that kind, doctor, if it occurred, might finally result in a breaking down condition of the entire system, might it not?

A. Concussion of the brain—severe concussion of the brain.

Q. What do you mean by that?

A. A severe jar to the brain, without laceration of the brain substance.

Q. A severe concussion of the brain might be followed by a good deal of mental disturbance—it might be followed by a very great deal of physical disturbance?

A. Not so much physically, but usually mental disturbance; their nourishment and condition of the body might remain very good, but the mind is weakened.

Q. A person may become insane, and have an apparently sound body?

A. Yes, certainly.

Q. But at the same time, an injury of that kind, may break down the physical state, with it, might it not?

A. They don't generally break down physically, that is, from concussion of the brain.

Q. I am not talking about usually; I say they may break down physically, may they not?

A. It depends on the conditions,—if you have an abscess in the brain.

Q. Will you answer "yes" or "no"—they may break down physically, may they not, on such injuries?

A. If you will define it a little clearer so that I

get a more definite idea—the question is so vague, it is hard to answer from a medical standpoint.

Q. You have been here in court and heard the evidence?

A. I heard some of her testimony.

Q. As she described the way she was injured, and the injuries upon her person, might it not result in a complete destruction of her physical health?

A. I don't think so. If I remember aright, she didn't know how she was hurt; the train came on her, and that is all she knew for a time—didn't know whether she was thrown out, jumped out, or struck with the engine or not.

Q. Supposing the brain wasn't disturbed at all —that is the seat of the nervous system?

A. That is the great centre, the brain and spinal cord.

Q. That controls all the organs of respiration, the nerves branch out from that, the respiration and digestion, and all circulation, does it not?

A. Oh, take the brain and spinal column together—they proceed over the whole nervous system.

Q. Isn t the nervous system something like a watch, that you cannot impair any part of it without affecting the other unfavorably?

A. Not very much. A man may lose a foot, and the rest of him be absolutely healthy.

Q. Will it not impair, at the time of the loss of the foot, to some extent, the health of the other parts?

A. From a pathological standpoint there is not much in that statement—the comparison is not a very good one: there is too much difference between a man and a watch.

Q. Can the hand say to the feet, I have no need of you?

A. I don't know what you are referring to, theology or medicine.

Q. You would not say that this woman was improved in health any by this shake-up, doctor?

A. I didn't know her before hand, I could not say, but I don't suppose she was, and I don't suppose she will improve until this case is settled.

Q. Then you think she will get well right away?

A. Yes sir, I do.

Q. By the way, you were employed by the company to go down there and examine this woman?

A. I was asked to go, and I went, and I expect to be paid for it.

Q. And you saw her for about how many minutes?

A. Well, I don't know; it was long enough to satisfy myself.

A. Can you give us any idea of the time?

A. You were present, and can make as good a guess as I can.

Q. Will you be kind enough, sir, to answer the question.

A. I don't know how long I was there—somewhere from probably ten to thirty minutes, I didn't keep track of it, or pay any attention to it.

Q. Would not a physician that had been caring for a patient, and we will assume, of course (I presume you think it a rational presumption) a man just as capable as you are yourself, a man who is just as capable as you are, and just as true in the actual care of the patient, treating her for months, would he not be more likely to know of the conditions than you?

MR. TORREY.

I object to the question.

THE COURT

It is an argument.

RE-DIRECT EXAMINATION

MR. TORREY.

Q. You didn't hear the medical testimony yesterday?

A. No, sir.

Q. What in your opinion would be the condition of a patient whose blood upon examination showed that the white corpusles were equal in number to the red corpuscles?

A. With reference to a human being, I suppose?

Q. Yes?

A. Well I should say there was something awfully wrong about such a case.

Q. Why?

A. There was no such case ever known. The white corpuscles never multiply to any such extent as that, never.

Q. Could a man live for an instant in such a condition as that?

A. Well, I don't suppose they would—I couldn't prove it, because no one ever discovered such a case.

Q. What is the highest proportion of all the corpuscles of the blood, that you have ever known the white corpuscles to form?

A. I am not an expert on that point—but it is—

MR. SHERWOOD.

I don't care for any more of your talk, if you are not an expert.

MR. TORREY.

We waive that for the present. You do

know that such a proportion would be impossible?

A. Yes.

Q Doctor, do you know what mitral stenosis is?

A. Yes, sir, I have an idea.

Q. Whether in your opinion that could result from hysteria?

A. No, sir.

Q. What is that?

A. It is a narrowing of the opening between the left side and the arterial side of the heart—below, and the same side of the heart, above. The heart is divided into four compartments, and when the blood comes back from the lungs to the heart, it passes through the left side of the heart and—the upper half of the left side goes into it first, then goes through the mitral opening down into the left arterial side. Stenosis meaning a contraction of that opening. That could not come from hysteria or anything of that kind.

DR. THEODORE H. WEISENBURG, Sworn for Defendant.

DIRECT EXAMINATION

MR. TORREY.

Q. You are a physician, doctor?

A. Yes sir.

Q. Of how many years experience?

A. I graduated in the University of Pennsylvania in 1899

Q. What has been your practice since then?

A. For the last six years I have specialized in nervous and mental diseases.

Q. Have you been connected with any clinics, or hospitals, or anything of that kind?

A. Yes sir I have. I am now Professor of nervous diseases in a Medical College in Philadelphia; I am Neurologist to the Philadelphia Hospital, which is a city institution; I am consultant to the Insane Department of the same hospital.

Q. Those are your hospital appointments?

A. I have other hospital appointments—I have the Philadelphia Polyclinic, where I am professor of nervous diseases also; I am also on the staff of the Pennsylvania Hospital for Epileptics, and I am consultant to a number of other institutions.

Q. Doctor, you made some examination of this plaintiff, yesterday, after the adjournment of court?

A. Well I didn't make an examination; I went into the anteroom and the patient was stripped as far as the waist, and I was allowed to look at her, front and back; and I asked her to move her head for me, and she attempted to do so, but I was not allowed to touch her, and no questions of mine were answered.

Q. Did you request permission to make any further examination?

A. Yes sir I did, but that was refused me, and I was only allowed to look at her.

Q. What other examination did you desire to make?

A. I wanted to examine her eyes—I wanted to examine her tongue; the different cranial nerves; her face; the upper and lower limbs, the back and neck; and this I was not allowed to do.

Q. You have been present in court. You were present a good deal of yesterday?

A I was present yesterday afternoon, and this morning.

Q. You observed the plaintiff, Mrs. Flannelly, during that period?

A. Yes, sir I did.

Q. And you heard the testimony of her physi cians, Doctor Pier and Dr. Butler?

A. Yes, sir.

Q.. And you had some information, in the testimony yesterday, or otherwise, of the character of the claim here; that is, it is claimed that she is suffering from the results of any injury received in a collision between a wagon in which she was riding, and and a railroad train, upon a railroad crossing, by being either thrown, or jumping from the wagon—that you understand?

A. Yes, sir.

Q. Now doctor, you are familiar with the dis ease known as torticollis?

A. Yes sir.

Q. What observation had you had an opportunity to make of that disease in the various dispensaries and hospitals and clinics

A. I have always at least four or five patients with this disease under my care.

Q. And you have seen it in various forms, have you?

A. Yes.

Q Have you ever seen what afterward proved to be a simulated case?

A. Yes, sir I have.

Q Whether or not the general appearance of torticollis is ever simulated?

MR. SHERWOOD.

I object.

THE COURT:

I will allow the question.

A. It is sir.

MR. TORREY.

Q. What varieties, either arising from true causes or otherwise, are there of torticollis?

A. In the first place there is what is called congenital torticollis, which, in other words, means that a patient is born with this disease; secondly, there is a form of torticollis which is due to so-called rheumatic cause, which appears in a rheumatic attack, or following a rheumatic attack, and which lasts only a short time; no case of such kind ever lasts longer than a week or two, and in every case total or full recovery results. The usual form of torticollis or wry-neck is due to a spasm or irritation of what we call the spinal nerve; this nerve is present in the base of the brain, and it supplies directly the different muscles which cause wry-neck. Now, when any nerve is irritated, the muscles which that nerve supplies will go into a spasm; therefore if you have an irritated condition of the spinal accessory nerve, you will get the muscle spasm, which would result from such a condition, and that is what is usually known and meant by ordinary torticollis or wry-neck.

Q. What is the location of that nerve?

A. The spinal accessory nerve comes from the base of the brain, from what we call the medulla oblongata.

Q. Now in the form which you have last described, of torticollis, resulting from the irritation of the nerve, what position does the head assume?

A. That depends upon the muscles which are concerned in the movement; for instance, if you

have the ordinary torticollis or wry-neck, and the only muscle which is involved—the sterno-cleidomastoid, or this muscle here (indicating); if you have for instance an irritation of this muscle on the right side, your head would be turned like this (indicatiag), with the head up and chin up in the air, and all the way over, just as I am doing now—just like that. If you have an irritation of the back muscles, that is the muscles back of the neck, which are also supplied by the accessory nerve, the head would be retracted iike this, with the chin in the rear, and if, for instance, you have this on the right side, the head would go up and the neck tilted to the same side, that is, if that muscle alone is diseased. Sometimes you have both diseased; that is, you have both the sterno-cleido-mastoid, and the back muscle would be retracted to the other side, and up, but always extremely to the other side, and always the chin up.

Q. Does the position which this plaintiff's head assumes, correspond with any form of torticollis?

A. Not to any known form of torticollis.

Q Is there any involuntary disease to which you could attribute that?

A. Torticollis,—real torticollis, if I understand your question, the result of the spinal vertebra, which if this is the case, you nearly always have a disease on both sides, which, in other words, would cause the patient to retract the head, up, and the chin in the air, just as I am holding my head at the present time.

Q. Do you know of any case of torticollis associated with the elevation of the shoulder, such as you have seen in this case?

A. Ordinary torticollis as we see it is never associated with the raising of the shoulder.

Q. Has there been anything in the movements of the plaintiff as you have seen her in court, or in your examination, which enables you to form any opinion as to the occasion for her head being in the position in which it is?

MR. SHERWOOD.

We object to this.

THE COURT.

Let him answer.

A. In my examination, Mrs. Flannelly had the contraction of nearly all the muscles of the neck, both in front and side and back, and her left shoulder was elevated and brought near her left neck, and when I asked that she move her head to the right and left, she didn't move at all; when I asked her to move forward, or back, she didn't move at all, and every movement she made of the head was a rigid movement, associated with the body itself. I observed Mrs. Flannelly when on the witness stand, and in reply to questions she would suddenly move her head, and sometimes elevate her head to the right and to the left, and she would, when she meant to imply "yes" she would suddenly move her head; if she had true torticollis, as we understand it, such a thing would be impossible: and then again, why should she, if she had true torticollis—

MR SHERWOOD.

You needn't make your speech to the jury, just answer the questions.

THE COURT

That is not a fair characterization of any witness on the stand.

MR. SHERWOOD.

Then I beg the pardon of the court, and of the witness.

A. Mrs. Flannelly keeps her head to one side, and this position in which she keeps her head is not a true position of any form of torticollis that I have ever known, or that has ever been described.

Q. Or any other disease?

A. Or any other disease that I know of.

Q. That is your conclusion?

A. My conclusion must be that the position of the head is simulated, and it is not the result of any known form of disease that I am aware of.

Q. Could the condition in which her neck and shoulder are, in your opinion, in any way result from a bruise on the side of the leg, and on the left side of the head?

A. No, sir, because the nerves which supply the particular muscles which cause the contraction of the head are in the base of the brain, and therefore any injury to the left side of the head could not possibly cause an injury to this nerve; and then even if she had an injury to the left side of the head, the injury to the left side could in no wise cause the head to go to the left, it should cause it to go to the right, because the left side of the brain controls the right side of the body; so it would be absolutely impossible for such a condition to be.

Q. Did you observe Mrs. Flannelly's hands yesterday at all?

A. As much as I was allowed, sir. I looked at her arms and her hands.

Q. What did you observe—did you observe any material difference between them?

A. No, sir. They seemed to me perfectly normal,

the skin seemed to be well formed; there is nothing to indicate disease of any form, and seemed to be as well nourished as they would be in any other woman.

Q. You heard Dr. Butler's statement of the different sorts of disorders that he found in his patient, did you, yesterday.

A. Yes sir.

Q. Whether any of the disorders, and if so what would be the natural or possible result of a fall, bruising the side, and leg, and the head on the left side;

A. I heard Dr Butler testify to the fact that she had a disease of her womb, and that the womb tipped back, and pressed upon the spinal column, and this that caused a constipation. As a matter of fact the spinal cord ends about six inches above where such a thing could be; and then again, all of the nerves of the spinal cord I claim are well protected, because the spinal cord is the most vulnerable portion of the body, so far as point of injury would be concerned; so that it is absolutely impossible for the womb to tip back and touch any of the nerves. Secondly, he testified that the patient had the mitral stenosis, or a narrowing of one of the valves of the heart, due to hysteria. Now, such a thing is impossible, because you cannot get a result due to any such cause at all. He again testified that the blood condition was different than it should be; he said for instance that there were an equal number of whites to the red corpuscles. Now the usual proportion of red blood cells is 5,000,000, to whites 10,000. In any disease,—in the worst disease that there is, which involves the white cells, the most that you could possibly get would be about 40 or 50,000 whites and about 3,000,000 of reds. So, his

statement of the proportion of two whites to one red is positively not so, because no one could conceive of such a condition.

Q. Whether the enlargement of the ovaries would be the natural result of such alleged injuries as I have described?

A. I don't, of course, know much about the diseases of the ovary.

Q. That is not particularly in your line. You do know, I presume a good deal about hysteria?

A. Yes sir, that is my business.

Q. Is it not true, doctor, that by reason of hysteria a patient sometimes, and often a great many patients involuntarily by some suggestion or other, simulate almost all sorts of disease?

MR. SHERWOOD.

I object to the question.

THE COURT.

It is leading. What is the effect of hysteria?

MR. TORREY.

Q. You may answer that question—What are the effects of hysteria?

A. Hysteria may produce or simulate any possible disease; in fact there is no symptom, medially known—I am now talking of course of the possible nervous symptoms—that cannot be simulated by hysteria. In fact hysteria might produce most every form of symptom; may produce a paralysis of one side of the body, or palsy of an arm, or a leg, and may produce most anything; and the cardinal or principal point of hysteria is that you may suggest anything to the patient; but not only that, but just as easily as you can suggest a disease, just as easily

can you take the disease away. That is its most principal point, and it is upon that you diagnose hysteria.

Q. Hysteria may be, and often is, the result of a shock?

A. Yes sir.

Q. Without any physical injury?

A. Without any physical injury.

Q. I think you heard Dr. Butler state something of the prognosis, or the probable progress of it, as to what would become of the neck, and chin, as it progresses, did you not?

A. Yes, sir.

Q. What was the statement,as you recollect it?

A. I think he stated that the patient—

MR. SHERWOOD

I object.

MR. TORREY.

Q. Whether or not, in your opinion, it is probable, or possible, that this condition this woman is in, will progress in such a way that her chin will finally be away down on her breast?

MR. SHERWOOD.

I object to the question.

THE COURT.

Certainly that can be answered.

MR. SHERWOOD.

It is leading.

THE COURT

It is according to the testimony already given.

A. Such a thing would be impossible, because to produce the lowering of the neck in this position,

one would have to have a spasm of both muscles on both sides, and they would have to be an entirely different set of muscles; the muscle which produces an action like that is, is not the muscle that produces an action like this, and in the case of Mrs. Flannelly such a thing is totally impossible.

Q. Whether from such examination, as you have been permitted to make, and such observation as you have been able to give to this plaintiff, she is now suffering from any definite or probable permanent illness or physical difficulty?

A. I should think not. She should, without apparent trouble, become entirely well, and that in a very short time.

CROSS EXAMINATION.

MR. SHERWOOD:

Q. You are supposing all that from the examination you made last night, and from what you have seen of this party?

A. Yes, sir.

Q If you are satisfied from the examination we allowed you, why were you so anxious to feel of her?

A. I am satisfied from my observation of the case in court, and from my examination which you permitted me to make.

Q. When you refer to the court, you refer to the time you saw her last night?

A. I refer to the time I saw her yesterday afternoon.

Q. You were satisfied from what you saw of her in court yesterday afternoon and what little you saw of her this morning when you went out to look at her body, weren't you?

A. No sir, I was more satisfied with what little examination I was allowed to make.

Q. You are completely satisfied on what you testified to?

A. Yes, sir, I am, or I would not testify to it.

Q. Notwithstanding that you asked to be permitted to feel of her body?

A. I asked, Mr. Sherwood, only to make such an examination that I would make of a patient in my office.

Q. That is, in order to definitely know about a patient in your office, you would make a different kind of examination from what you made here?

A. I don't think so, sir, because very often, Mr. Sherwood, because of the fact that you become familiar with the disease you are very often able to make a diagnosis without asking the patient a single question.

Q. Very well,—the physician who attends, and becomes familiar with the case, is very apt to make a better diagnosis?

A. That depends.

Q. You assume to be a very highly cultured and educated man in the science of medicine?

A. My dear sir, I don't assume anything of the kind.

Q. You are Professor of a number of schools; is that right?

A. I hold those positions, yes sir.

Q. Are you an attorney?

A. No, sir, I am not.

Q. You sat at the attorney's table yesterday, did you not?

A. I was asked to sit there.

Q. You assisted in the examination of our physicians?

A. Mr. Torrey asked me questions from time to time, that were brought into the testimony, and I told him what I thought about it.

Q. You are paid to come up here and assist in defending this law suit—were you not?

A. No, sir, I was not.

Q. Who sent for you?

A. I came for three reasons; first, I came to Wilkes-Barre, at the request of a lawyer in Philadelphia, to testify in a case, and give my opinion in a case in which a man was suing, I think, one of the roads near Wilkes-Barre, consequently I came up here.

Q. Which side was your opinion on there?

A. On the side against the railroad. Then I was asked to come up here by Mr. Crippen, to examine a man for the Delaware & Hudson Co.; thirdly, I came up last night to address the Lackawanna Medical Society upon a neurolgic subject, and while I was here yesterday morning, Mr. Crippen asked me if I would not become interested in this case, and I came to court therefore in the afternoon.

Q. You were brought here in the interests of this company, in two cases at least?

A. No, sir in one case only; the other case I became interested in yesterday morning, after I examined the other patient—now I am interested in these two cases.

Q. Have you ever been employed by them before?

A. No, sir.

Q. Have you given evidence in a good many cases of this character?

A. Quite a good many, yes sir.

Q. Now, you say she is not suffering from any permanent condition.

A. That is my belief.

Q. And you say that she hasn't wry-neck or torticollis, but that that does come from an injury to the—what is the name of that nerve?

A. Spinal accessory nerve.

Q. That is that portion of the spinal cord which connects the brain with the spinal cord, is it not?

A. Yes sir, the medulla oblongata.

Q. Well, it is one of the parts of the brain, so called—it is so closely allied?

A. I would not say "allied," Mr. Sherwood, it is a part of the brain itself; it is located at the base of the brain.

Q. And from that come out the nerves to the different parts of the body?

A. Yes, sir.

Q. How would you go to work to injure the nerve—supposing a person was entirely well, could the nerve not be crushed by a blow?

A. Not the spinal accessory.

Q. Could any nerve, sir?

A. Well, if you had a nerve for instance the median nerve that supplies my hand, that is possible, but not at the base of the brain.

Q. Could not a shaking up of the brain, or a concussion, as it is called, so as to impair some portion of the brain which might interfere with the function of the nerve later on?

A. To the spinal accessory?

Q. Any nerve?

A. Why, no sir, that is totally impossible—absolutely impossible.

Q. Couldn't inflammation of a muscle—would that not impair the nerve that was included in that muscle?

A. Well that depends—it depends upon its nutrition of the nerve, and if the nerve is diseased the muscle will necessarily become impaired

Q. If the muscle itself is injured and impaired, will that not impair the nerves contained within that muscle?

A. Not necessarily.

Q. We will lay the necessarily aside—might it not?

A. That is not so.

Q. Is it not true that to every part of the human body the nerves are so thickly and minutely set that even the bite of a mosquito on any part is immediately known?

A. It is not due to the fact that there is a ramification of the nerves, but due to the fact that there is a pricking of the skin, and that is what causes the pain.

Q. You say the nerve doesn't have anything to do with it?

A. Indirectly.

Q. What telegraphs that to the brain,—the fact of the bite of the mosquito?

A. I would have to go into a long discussion; for instance if you strike my knee at this point, I become immediately conscious that such a thing has been done, by the fact that the impulse has been trnsmitted along the tendon, and from the tendon to the brain (bone), and the brain (bone) to the nerve,

and the nerve to the spinal cord, and then to the brain.

Q. Supposing you cut that nerve in two, at some point, would that cause you suffering or injury?

A. It would depend upon what nerve you cut, because there are two forms of nerve—that is what we call the motor nerve—

Q. If you cut the motor nerve, you couldn't move?

A. You would have paralysis of that nerve.

Q. A person might lose entire sensation, and still have motion?

A. That is possible—it is, because of the fact that the motor nerves are intact.

Q. Well, take this fact you say that the dislocating of this woman's womb could not be caused by an injury; doesn't that sometimes result from a run-down condition?

A I don't know anything about the womb conditions; the only statement of mine in regard to that is that Dr. Butler said it pressed upon the spinal column, and such a thing is impossible.

Q. Is hysteria frequently caused by injury under sad and frightful circumstances?

A. Hysteria may be produced by anything, and it is produced by just the same as you mentioned.

Q. So that if a woman received an injury herself to any extent, in connection with the death of a loved one, friend, or member outside the family, might not that shock to her nervous system be such as to derange the mental equilibrium of that person?

A. No, sir

Q. You could not conceive of such a thing?

A. No sir no one would think of admitting it. There is no case of record where any injury such as

describe could produce any form of insanity by any form of mental disturbance.

Q. Are there any cases of record where the loss of a loved one alone, has caused insanity, just by that party brooding over it, weeks and months afterwards?

A. Then they would brood weeks and months afterwards: in other words the cause would be a long cause, not one just as you mentioned.

Q. Now this torticollis, it depends you say, the direction the neck is drawn, upon the muscle and nerves involved?

A. Yes sir.

A. And a person don't get to the worst stage all at once?

A. The disease is gradual in its on-set, and you don't get to the worst stage all at one time.

Q. So that if a person who had never been troubled with it had that disease develop, following an injury, and there is no other known cause for it, such as some of the causes you have enumerated here;—if it follows an injury to some portion of the head, at or about that nerve that you spoke of, might not such condition as this woman is in at the present, result from such an injury?

A I don't think so sir, and then that would depend also as to the time of the on-set of this disease, and in relation to the injury.

Q. When would be the on-set?

A. It would be immediate, if such a thing were possible.

Q. Suppose a woman were put to bed, and it was observed a few days afterwards,—oh three or four days afterward, or five, would you call that immediate would you?

A. No, sir.

Q. It would have to be in five minutes?

A. It comes on immediately—that is what the word, means.

Q. Instantly?

A. Instantly, yes, sir.

Q. Could it come on so perceptibly, so that the un-skilled eye would see it immediately—You haven't got it now, have you? You are tipping your head a litle I notice?

A. I will have to get a better look at you, sir.

Q. Couldn't the top of the head begin immediately, say, so slightly that no one would suspect it, and yet a few days afterward there would be observed, the head was a little peculiar, and that gradually developed, and finally got in the condition this woman is now in?

A. I evidently didn't make myself clear when I talked to you about spasmodic torticollis; it comes in spasms—just as I saw you now;—and if such a thing—

Q. You heard Dr. Butler testify on spasmodic torticollis?

A. Yes, but it is not a case spasmodic torticollis at all.

Q. And you say it doesn't have the indications of rheumatic torticollis?

A. No, sir, it does not.

Q. And it doesn't have the indications of congenital torticollis?

A. No, sir, there is no evidence of that.

Q. Now then doctor, if she is not faking; if you should be mistaken about that allegation you make here, and if it is not in any of those depart-

ments, or under any of those heads, pray tell me what it would be classed as coming from?

A. It could not, medically, be classed as coming from anything, because it does not conform, as I said to any known spasm, or known form of torticollis.

Q. If she has torticollis, it is a condition of great suffering, isn't it?

A. No, sir.

Q. Well, it is a great embarrassment, and great inconvenience?

A. It doesn't cause any suffering at all.

Q. It fixes a person in one position, that she has to turn the body to turn the head?

A. Yes, but it depends on the person; to some it would not make much difference, but to others it would.

Q. Do you think it would make much difference with her?

A. Yes, because she would naturally want her head in a straight position.

Q. What class do you refer to?

A. There is such a thing as congenital torticollis —I have seen it, and some of those little boys and girls have their heads in this position, and they are just as well off as anybody.

Q. Did you ever know of torticollis resulting from injuries?

A. Yes sir I have.

Q. Then Doctor Burns when he said it could not, was mistaken?

A. Dr. Burns said that torticollis, such as he saw in this case, was impossible, as the result of injury.

12:30 adjourned to 2 p. m.

Now, 2 p. m. court reconvenes.

(Same witness on the stand).

MR. SHERWOOD.

Q. Doctor, suppose a woman in sound health receives injuries in an accident by having an engine hitched to a passenger train running rapidly strike her wagon, and either strikes her or she is thrown so that she falls and is bruised considerably upon the left side of the hip, and upon, or near the left ovary, and the left side of the hip and down along the thigh, so that she is partly insensible and loses her voice at midnight following the accident which occurred about 11 o'clock that day; the condition of lost voice lasts for several days—three or four days, so at the end of which she has a miscarriage of a fetus three or three and a half months old, followed by an unusual flow of blood, large quantities such as is larger than the usual quantity following a miscarriage; would not that affect the health of that woman unfavorably?

A. Yes.

Q. Would that cause great suffering?

A. That would depend upon the condition of the patient at the time of the injury, and the extent of the injury, and the form of the injury that the patient sustained.

Q. I gave you the circumstances, and asked the question based upon what I gave you?

A. Well the patient would naturally suffer from the fact that she had a bruise upon the head and side, and that would probably last a day or two. She would probably suffer because of the miscarriage —that much I know nothing about. Some disturbance, but I am not prepared to say much about that.

Q. Don't miscarriages tend to break down and deteriorate the system of a woman?

A. Not the nervous system.

Q The physical system?

A. Well, I don't really know much about miscarriages.

Q. And you, as an expert on the nervous system will say to the jury that you don't know enough about the effect of a miscarriage to answer that question?

A. I have never seen yet a miscarriage which has had a bad influence upon the nervous system.

Q. I am asking about the physical system?

A. I don't come in contact with mis-carriages.

Q. How can you give any shock to the nervous system without impairing the physical system?

A. In my practice I haven't seen a miscarriage for over 6 years, and therefore am not in a position to say.

Q. You have your recollection of six years ago —what about the one six years ago, did it affect the physical condition, unfavorably?

A. Why that would depend, I suppose, upon the mis-carriage, but I am not in a position to answer that, for I don't know enough about it.

Q. How many did you have, six years ago?

A. I never had any. I wouldn't have anything to do with them. I said for the last six years I haven't come in contact with any such case. Previous to that time, in my hospital and other experience, I naturally did, but I am not in a position at this time to say what I did six years ago at the present time I should say I would not know anything about it.

Q. Six years ago, and along about that time, you did have some practice in that line?

A. Oh yes, as much as any other—

Q. Your practice then included such cases?

A. Yes.

Q. And you have forgotten all you ever knew about it?

A. Oh no, I don't forget all I knew about it, but I have been specializing for the last six years.

Q. Have you forgotten now, and you cannot tell whether it affects the physical state of the patient, favorably or unfavorably?

A. Miscarriages, from my recollection of such troubles, come on without apparently any cause sometimes, and sometimes they apparently don't trouble the individual at all; as a matter of fact, it is a well known fact that women will give birth to children and go on working; I cannot illustrate it to, but that is a matter of fact; for instance savage races, and other races; and a person may have a miscarriage without the slightest disturbance, physically.

Q. Isn't that one of the most common occurrences of the ordinary women breaking down; isn't it viewed by women, and the medical profession generally, as a sort of alarm?

A. It would depend largely upon the cause of the miscarriage, whether brought about by the woman herself for an illegitimate purpose, or whether it came on naturally.

Q. Would it make any difference, as to affect the nerves?

A. Oh yes, largely.

Q. If it is brought on by an abortionist, criminally?

A. Then it would, of course.

Q. Did you ever perform any such—

MR. TORREY.

I object to the question.

THE COURT.

I would not permit such a question as that.

MR. SHERWOOD.

Q. Wouldn't the disappointment over the loss of a child, under such circumstances be liable to worry the ordinary female, and tend to cause hysteria?

THE COURT.

With nine others in the family, I suppose.

MR. SHERWOOD.

Yes, in this case, with nine 'others in the family?

A. Any disappointment of any kind will bring on hysteria; I have testified to that effect.

Q. And a mis-carriage is liable to cause a misplacement of the womb—one of the causes?

A. I dont know anything about miscarriages.

Q. Is not hysteria a mild condition of insanity?

A. It is not.

Q. Is it not sometimes a fore runner, leading up to it?

A. It is not.

Q. You made this answer to Mr. Torrey "Hysteria may be the result of shock without physical injury"; is it not more likely to follow shock, accompanied by physical injury?

A It is.

Q. You said "Ordinary torticollis never was associated with the raising of the shoulder", then if this woman's ailments are true, as she claims them,

having both the pulling over of the neck and the raising of the shoulder, then you would think there were two separate departments of her physique that were injured?

A. I should say there were two different mechanisms which are involved.

Q. That would be worse than if the Torticollis was by itself, assuming that they were true?

A. I don't think it would make any difference.

RE-DIRECT EXAMINATION.

MR. TORREY.

Q. Doctor, you heard Dr. Pier's testimony yesterday?

A. Yes, sir.

Q. And you heard the cross examination, in which he was taken step by step through the treatments which he gave the patient, from his first visit, the day after the accident, and for several weeks at her house, and afterwards at his office, did you?

A. Yes, sir.

Q. Whether or not, in your opinion, a miscarriage could have occurred within a week after the accident, followed by a continued flow of blood, without his having discovered it, and treated it.

MR. SHERWOOD.

We object to this.

THE COURT.

I don t think that is a proper question. It doesn't seem to me that is a proper question, because it is in a way argumentative, If I may be allowed the expression; it would allow you to say that Dr. Pier didn't know

anything about any mis-carriage when he saw it.

MR. TORREY.

I won't press it your honor.

Q. You were not permitted last evening, as I understand you, to test the flexes of the muscles of the upper and lower limbs of the patient—of the plaintiff?

A I was only permitted to look at her.

Q. Did you acquire any knowledge with reference to those flexes?

A. Yes, they would be indicative, or that would indicate the condition of the nervous system, whether it was an irritative condition or a normal condition.

Q. Did you have any other way, other than by your examination, of acquiring a knowledge whether those flexes were perfect or imperfect?

A. Dr. Butler stated that—

MR. SHERWOOD.

I object.

MR. TORREY.

Q. That was in the presence of the attorney?

A. In the presence of the attorney.

MR. TORREY.

The purpose was to elicit from the witness that in the absence of any opportunity himself to test the flexes, he asked Dr. Butler about it, who said it would be unnecessary as they were entirely perfect and unobstructed in any way.

THE COURT:

I don't think that would be evidence.

BY THE COURT

Q. Is hysteria more frequent in women than in men?

A. It is commonly thought to be sir, but as a matter of fact it is just as frequent in men as in women.

Q. In hysteria, a person may have hysteria and simulate a condition that does not exist, and be honest in it—may they not?

A. Yes sir, but the simulation would be different from that of true simulation.

Q. I say, a person may honestly, under the effect of hysteria, think they are ailing, when they are not?

A. Yes sir.

Q. And with entire honesty?

A. With entire honesty.

MR. TORREY.

Q. Do you know what would be the source of such an impression in the mind, would it be auto-suggestive, or suggested from outside?

A. Any suggestion. It might be either; auto-suggestion or suggestion from some one else.

MILO GARDNER, Sworn for Defendant.

DIRECT EXAMINATION.

MR. TORREY.

Q. Mr. Gardner, where do you live?

A. Carbondale.

Q. What is your age?

A. Forty-eight.

Q. Your occupation?

A. Locomotive engineer.

Q. How long have you been a locomotive engineer?

A. Twenty-six years.

Q. How much of that time have you been with the Delaware & Hudson Railway?

A. Twenty-six years.

Q. Were you the locomotive engineer of the passenger train which struck this wagon on the 30th of July?

A. Yes sir?

Q. What train was that?

A. On the schedule east then, No. 13.

Q. Leaving what point?

A. Leaving Wilkes-Barre.

Q. At what time?

A. 10:30.

Q. And what was the last station you stopped at before reaching this crossing?

A. Pittston.

Q. Will you tell us what, if any, signals you gave for this crossing, which you call, I believe, Smithville crossing?

A. Yes, sir, I blew the signal crossing—or the crossing signal back near Brown-town crossing.

Q. What is that crossing signal?

A. Two long and two short.

Q. Blasts?

A. Blasts of the whistle.

Q. Any other signal, I mean beside the whistle?

A. At what time?

Q. Did you ring the bell at all?

A. Yes sir, the bell was ringing.

Q. When was the bell started ringing?

A. As soon as we started from the station at Wilkes-Barre.

Q. What sort of a bell is it?

A. It is a locomotive bell.

Q. How does it operate?

A. By air, automatically.

Q. As to the time before you reached this crossing; we will begin with your leaving Pittston station; when, after leaving Pittston station, did the bell begin to ring?

A. It was ringing automatically all this time—the whole distance.

Q. And when was it shut off?

A. After the train stopped, below the crossing.

Q. By "below," you mean this side?

A. This side, after striking this crossing.

Q. You have told us about the crossing signal with the whistle; will you tell us what happened after you gave that signal; give us your account of all that happened?

A. About that time we passed a Jersey Central freight train.

Q. What track was that on?

A. On the right hand track, going south, or the left hand track to me.

Q. Were there any tracks intervening between that track and your one?

A. No, sir.

Q. You then were on the middle track?

A. Yes, sir.

Q. You say you were passing that train—what happened next?

A. I discovered that there was somebody at the crossing below.

Q. Where did you discover that?

A. About how far from this crossing do you mean?

Q. Yes?

A. Well I should judge six or eight hundred feet, somewhere along there, shortly after I blew the crossing signal.

Q. What else, with reference to signals was there, if anything, down there?

A. After I had blown the crossing signal, and was passing this Central train I started to blow the warning to any one that might be on the track. It is customary for engineers while passing other trains to warn section men or workmen or anything of the kind, with the whistle.

Q. On account of the noise of the passing train?

A. Yes sir that they may not stand on the track and get caught there. I started to blow that whistle that is while passing the Central train, and at that time I noticed somebody on that crossing down there, and I wanted to attract their attention, and consequently I held the whistle wide open—that is a long continued blast.

Q. How long?

A. Until I was passing their caboose, If I remember rightly—the Central train's caboose.

Q. About where was that?

A. I should imagine about two or three hundred feet south of this crossing.

Q. Which way is the grade along there?

A. The grade runs north, that is, it is down hill going north.

Q. You were running down hill, going north?

A. Yes, sir.

Q. From the time you left Brownsville station, what amount, if any, steam did you have on?

A. Not any.

Q. That is the crossing south of this one?

A. Yes.

THE COURT.

Browntown crossing.

MR. TORREY.

Yes; the Browntown crossing.

Q. When, if at all, did you put on any brake?

A. At about the point of the curve the brake was applied lightly.

Q. Was that before or after you saw this wagon?

A. Shortly after.

Q. Then go on and describe what was done?

A. And as I approached the crossing I saw this woman drive on the crossing directly in front of me and stop the horse, at that I pulled the brake full; she jumped out of the wagon and went to my right; I saw a boy jump out on the right side of the wagon, but couldn't tell where he went; I saw the third one in the wagon as it drawed across in front of me.

Q. Where was the horse?

A. Where was the horse, when?

Q. When you struck it?

A. The horse had drawed the wagon across, so that I didn't strike the horse, but the wagon.

Q. How far were you , in your opinion, or your best recollection, from the wagon when you saw the woman jump?

A. I should think about 200 feet.

Q. Who was the woman, if you know; is she here is court?

A. I think she is, yes, sir; the lady in the chair.

Q. Mrs. Flannelly?

A. Mrs. Flannelly.

Q. How did she land when she jumped?

A. On her feet.

Q. What did you observe next?

A. Simply as the cab passed her I heard her holler.

Q. Go on and describe what you are talking about, and about your train?

A. The train went about four car lengths over the crossing, or the engine was a little farther than that.

Q. Then what?

A. We were stopped.

Q. Could you tell whether the engine struck her at all?

A. I saw very plainly that the engine didn't strike her.

Q. You say she struck on her feet?

A. Yes, sir.

Q. If she left her feet at any time?

A. I could not say as to that; she was at my right then, and my attention was ahead.

Q. How was she when you passed her, was she standing, or had fallen?

A. I could not positively say—I simply saw her strike the ground and clear the engine, on her feet; and from that time on she left my eye.

Q. Did you go back after you stopped?

A. No, sir, I didn't.

Q. You didn't leave your engine?

A. No, sir.

Q. Did you see her again?

A. No, sir, I didn't

Q. Have you been running on this division of the road all the twenty six years you spoke of when

you said this division, the Pennsylvania Division of the Delaware and Hudson?

A. Yes sir.

Q. How many years have you run a passenger train between Carbondale and Wilkes-Barre?

A. About five.

Q. Will you tell us the uses to which those three tracks were put in the summer of 1907, and for any period before that—what was the most westerly track, then, the one next?

A. The Lehigh Valley track. That was the south bound, used for all trains going south.

Q. And what was the middle track?

A. The north bound.

Q. And what was the easterly track?

A. A switch or a slow track as some called it, used for trains to come down to that point ahead of first class, or anything that they might choose to pull down there for.

Q. What do you mean by "down"?

A. Down hill, from Yatesville.

Q. How far is Yatesville from this crossing?

A. About two miles.

Q. What is at Yatesville?

A. A yard for storing coal, etc.

Q. In what direction, if you know, did trains run upon this easterly track?

A. North.

Q. Did you ever know of any trains running in the opposite direction?

A. Never was one on there in that direction.

Q. You say you passed a Jersey Central freight train as you approached the crossing?

A. Yes sir.

Q. What, if any other, trains were upon any of the tracks there you saw that day?

A. After I had stopped, looking west to the Lehigh Valley track, there was a coal train stopped there.

Q. Was there any train upon the easterly track?

A. No, sir.

Q. Between the southerly end of that fourth track, or slow track as you call it, the easterly track at Yatesville, and its end which is above this crossing, whether you passed any train or cars upon that track that day, or upon that run?

A. No, sir, I did not.

CROSS EXAMINATION

MR. SHERWOOD.

Q. Did you pass any on the other tracks?

A. Which do you call the other?

Q. On the south bound track; did you pass any trains between Yatesville and this crossing?

A. The Jersey Central train was on the south bound.

Q. Did you pass any other train, than the Jersey Central?

A. No, sir.

Q. Do you mean you didn't, or you simply don't recollect?

A. I mean I don't think we past any.

Q. When you speak of never seeing trains running northward on the track on the east side, you mean you don't recollect having seen any?

A. The trains are not supposed to run easterly —they don't run easterly—does that suit you?

Q. You are not sure, all the time, are you?

A. No, sir.

Q. How many runs did you make a day?

A. I past over that track four tines.

Q. Four times a day?

A. Yes, sir.

Q. And in passing that point, you occupy but a few seconds at a time?

A. Not any great length of time.

Q. And the knowledge which you have, you have gained in passing to and fro, by that crossing?

A. I don't really understand you.

Q. I say, and the knowledge which you haae regarding that matter, you have gained by passing to and fro in that way?

A. Not wholly.

Q. Well, largely?

A. A certain part of it.

Q. And the other is hearsay, from conversation?

A. No, sir, it is from the instructions on the bulletin boards.

Q. Have you any of those instructions with you?

A. No, sir.

Q. Those are printed instructions, are they?

A. Yes, sir.

Q. Well, you passed the Jersey Central train before you got to the crossing, and you say you passed that train; about where was the engine of that train when your engine passed it?

A. Nearly up to the viaduct, of which we have heard spoken.

Q. And you passed the hind end of the train where?

A. Down near the crossing.

Q. Within what distance of the crossing?

A. I should say three hundred feet.

Q. So that that Jersey Central train at least was a long enough train to extend from a point about at the crossing, to the viaduct?

A. Somewhere near that.

Q. Was the Jersey Central train moving rapidly or slowly?

A. Not very fast, as I could see.

Q. You are a practical railroad man, give us some practical idea how fast it was moving?

A. About twelve miles an hour.

Q. You said you didn't go back to the crossing at all after the accident?

A. Personally, no sir.

Q. And when you say that the woman was thrown and struck on her feet, you refer to the time, just the immediate time of her striking, and then you went by I suppose?

A. That is what I saw, in my eye.

Q. And when she struck there, as you say, she did, how close were you upon her?

A. I should think about 100 feet.

Q. And immediately she went out of sight from your eye?

A. She cleared the track.

Q. I say, and immediately you went by?

A. Yes.

Q You have already testified that what became of her afterward you don't know?

A. I don't know.

Q. But, as the cab passed, you did hear her scream?

A. Yes sir.

Q. How far did I understand you to say you were from the crossing when you applied the brake?

A. The first application?

Q. Yes?

A. Between three and four hundred feet.

Q. Within what distance could you have stopped the train?

A. I can not tell you.

Q. Your experience extends over how many years?

A. About twenty-six years.

Q And five years on this immediate road?

A. Yes sir.

Q. Did you ever run it with the steam alone, with steam power, as on that date, as any other time?

A. What do you mean about steam power?

Q. Don't you know what that means?

A. Not what you mean, I don't know.

Q. What kind of power were you running the engine with?

A. Gravity.

Q. Just gravity?

A. Yes sir.

Q. Did you ever run down there with gravity power alone?

A. Yes sir.

Q. Did you ever make an effort to stop a train of that size, that train, when you were running by gravity alone, at the rate of speed you ruuning that day?

A. Yes.

Q. Do you know within what time it is possible to bring it to a stand?

A. No, sir.

Q. Notwithstanding you made the effort?

A. No, sir.

Q. Could it be brought to a stand inside of 500 feet?

A. I don't know.

Q. Were you on time that day?

A. Yes.

Q. You were running down grade.

A. Yes, sir.

Q. What time did you leave Pittston station?

A. I think the schedule shows 10:42, that is the time we leave there.

Q. Do you make any report ot the times you leave stations?

A. No, sir.

Q. Is there a report of the freight trains run, or other trains upon the road?

A. Yes, sir.

Q. So that by the written reports we may know the trains that were upon the respective tracks?

A. By reading the reports—the train-sheet shows those trains.

Q. Do you know how much of a grade that is at that point?

A. I don't.

Q. Is it what we call a heavy grade or a light grade?

A. Medium, I should call it.

Q. What do you mean by medium, how much to the 100 feet we will say?

A. Thirty-five feet.

MR. TORREY.

To what?

A. To a mile.

MR. SHERWOOD.

Q. You say you noticed someone at the crossing when you applied the brake?

A. Yes.

Q. And that is the point at which you began to blow the danger whistle?

A. Yes, sir.

A. And that is where you began to hold the whistle steadily opened wide?

A. Yes sir.

Q. Is this your train that is photographed, coming up along the track?

A. No, sir. (Exhibit No. 6)

Q. This bell, you didn't give any attention to at all, did you?

A. Only to hear it ring.

Q. You set it going in Wilkes-Barre, and you listened to it carefully all the time until you got to Scranton?

A. You cannot help but hear it when you are running.

Q. You didn't even stop it at stations—the ringing of the bell?

A. No, sir.

Q. What is the object of keeping it ringing all the time?

A. Simply because it is a bother to the engineer to stop it.

Q. The crossings and by-stations are so numerous in that locality between Wilkes-Barre and Scranton, that you don't stop it?

A. Not in that locality.

Q. Can you give us some practical idea of about how many streets you cross?

A. I cannot do it, unless I count them up.

Q. It is a large number any way?

A. Quite a number.

Q. More streets than depots?

A. If you call a country road or a wagon road a street.

Q. More crossings than depots?

A. Yes, sir.

RE-DIRECT EXAMINATION.

MR. TORREY.

Q. Assuming that there had been any train upon the No. 4 or slow track, near the crossing, as you approached it, whether you could have seen the wagon?

A. Not so well.

Q. When you did see it, could you have seen it?

A. I don't think I could.

RE-CROSS EXAMINATION

MR. SHERWOOD.

Q. In other words, if there were cars on the east track, it would cut off the view, not only of the traveler looking toward you, and you, looking toward the traveler?

A. Yes

Q. And it would not be the opportunity of either party to save the other from disaster?

A. No, sir.

Q You saw the Lehigh Valley train?

A. After I stopped.

Q. And you saw the Jersey Central train?

A. Yes sir.

Q. And they were either just crossing, or just had crossed the crossing?

A. The Jersey Central had crossed, and I don't

know anything about what the Valley was doing at that time.

Q. Did you make any unusual effort, anything more than the usual effort, to give signals as you approached that crossing?

A. When I discovered this party, as I say.

Q. But before that, in approaching the crossing, you blow the ordinary whistles?

A. The road crossing signal, yes, sir.

Q. Two long and two short?

A. Yes, sir.

Q. How far was that below the viaduct?

A. Just coming to the signal post, whatever distance it measures, I cannot say.

Q. You spoke of the Browntown crossing; which crossing is that—I don't understand where it is?

A. That is the first crossing, back toward Pittston.

Q. That is below the viaduct?

A. Yes sir.

Q. That is the point you mean, where you applied the whistle?

A. Yes, sir.

THE COURT.

Q. How far is it from this crossing?

A. Well, I cannot give you the distance—It would take the yard foreman, or an engineer.

MR. TORREY.

The engineer testified this morning it was 1300 feet, something like that.

GEORGE MASON, Sworn for Defendant.

DIRECT EXAMINATION

MR. TORREY.

Q. Where do you live Mr. Mason?

A. Carbondale.

Q. What is your age?

A. Thirty years.

Q. What is your occupation?

A. Locomotive engineer.

Q. How long have you been a locomotive engineer?

A. For the last month—just been promoted.

Q. What was your occupation in July 1907?

A. Fireman.

Q. How long have you been a fireman?

A. Two years.

Q You were a fireman for Mr. Gardner on this run that day?

A. Yes, sir.

Q. About where in the engine, were you as you passed between Browntown crossing and the Smithville crossing?

A. The left hand side of the cab.

Q. What if any signals were given for the Smithville crossing?

A. The regular whistle signal for road crossing, two long whistles and two short.

Q Where was that given?

A. You mean for the second crossing, or the first one?

Q. For the Smithville crossing?

A. Just after we passed the first crossing

Q. The Browntown crossing?

A. Yes sir.

Q Was any other signal given?

A. He whistled the warning blast while passing the Central train, and then he held the whistle right down, when he discovered the people on the track.

Q. How about the bell?

A. It was ringing

Q. When did it begin to ring, and when did it stop?

A. Started to ring as soon as the conductor gave the signal to go ahead at Wilkes-Barre, I pulled the bell, and it keeps going by air.

Q. When did it stop?

A. Mr. Gardner stopped it after he stopped the train.

Q. That was after the accident?

A. Yes sir.

Q. Now, as you came up, did you notice any other trains on any track there?

A. There was a Central going down.

Q. What sort of a train was that?

A. A freight train.

Q. You were on the middle track, and that was to your left?

A. Yes, sir.

Q Where were you looking, if anywhere, at the time you approached the Jersey Central train?

A. I was looking down to see if I could see the block signal.

Q. By that you mean the semaphore?

A. Just below the crossing.

Q. North of the Smithville crossing?

A. Yes, sir.

Q. Where were you looking—that is, how were you looking for that?

A. Straight down the track.

Q. Were you looking out of the side, front or how?

A. Out of the cab window. The Central train passed us, and I looked out the front window.

Q. What did you first see of any wagon or anything of that kind upon the crossing?

A. I saw a one-horse wagon, the horse standing close to the track, and I just saw them standing, and they started, and I hollered across to the engineer—they were going over ahead of us; of course he didn't hear me—we couldn't hear one another on the engine; and I saw the lady jump out—jump out and run on the engineer's side.

Q. How did she strike, when she jumped?

A. On her feet.

Q. Did she fall at all?

A. Not as I seen; the first I saw was her standing up, with the horse stood in the track; she stood up and started to jerk on the lines, and the little boy was hitting the horse with the whip.

Q. Do you know which of the boys had the whip?

A. No, sir.

Q. Did you see anyone else jump out of wagon besides her?

A. The boy; she jumped out one side, and the little fellow climbed over the seat, and I thought he got out, but it appears he didn't.

Q. What part of the wagon did she jump from?

A. The seat was toward the front end, and she put her hand right on the wheel and jumped right over.

Q. You say she jumped over toward the engine?

A. The way the engine was going toward her—she jumped to her left.

Q. Toward the south?

A. Yes, toward the south.

Q. Could you tell whether the engine struck her?

A. I could not, she got out of my view when she got on that side.

Q. Was she on the track when you saw her jump off?

A. She jumped on the left hand rail, going this way.

Q. That is the right hand rail you were on?

A. Yes, our right hand rail.

Q. And you say you saw her run?

A. I saw her run off the track, the other side; how far she went I don't know.

Q. That is, toward your right or left?

A. Toward my right, toward the engineer.

Q. After you crossed the crossing, what happened?

A. As soon as we slowed down, I said to the engineer "they all got out."

Q. About how far over the crossing did you run before you stopped?

A. The engine was about two train lengths from the crossing.

Q. Did you stand there, or back up?

A. They stood there, I went back before the crew got back; the crew went back, and I went back there to, and I saw the wagon, which was tipped over; just shoved aside, and the horse was out across on the bank; I led the horse off the track a little ways, I was afraid some other train might come south, and I tried to lift the

wagon off, but it was too heavy for me, and I asked some gentleman to try to help me out; and the lady came over and said "my pocket book is in that wagon" and I said "when I get off the wagon, we will look for it" I picked up the pocket book, and handed it to her, and she picked it up and looked in it.

Q Do you recognize the lady here?

A. Yes sir.

Q. Mrs. Flannelly, was it?

A. Yes sir,

Q. You saw her boy there, did you?

A. Yes, a little boy. She said "Holler, why don't you holler" to the boy. The boy didn't holler until he saw the little comrade dead, and then he started to cry.

Q. On which side of the track was the wagon?

A. On the right side, from here—right side going sonth—you mean after it was hit?

Q. You mean on the west side?

A. Yes, the west side.

Q. Was it on, or over the westerly track—the south bound track?

A. It was on the track, that is why I lifted it off there.

Q. What appearance, if any, of injuries did you see about Mrs. Flannelly?

A. Didn't see any, she was frightened.

Q. Did you notice whether her clothing was torn?

A. I didn't see any tears in it.

Q. Now, where was the caboose or hind end of the Jersey Central train when you passed it, with reference to the crossing?

A. About a train length from the crossing—our train length.

Q. What sort of train?

A. A passenger train—about 300 or 400 feet.

Q. Whether or not there was any train either moving or standing upon the No. 4 track, or the slow track, the easterly track there?

A. There was no train there.

Q. From the time you left Yatesville until you reached this Smithville crossing, did you see any train upon that track?

A. No, sir.

CROSS EXAMINATION.

MR. SHERWOOD.

Q. How long was it after you got back there, before this lady came, and you had this talk about the pocket book, and she said to the little boy "holler, why don't you holler"?

A. Just as soon as I got there I saw the wagon there, and I wanted to get it off the track, and out of the way of future danger, and she came to me then.

Q. Who else was there at that time?

A. No one else near by at all. There was four or five people around, and there was some man helped me with the wagon to move that out of the track.

Q. Who was that man?

A. I don't know who he was.

Q. Have you seen him here?

A. I don't know if I have.

Q. Did you see any women standing near by?

A. There was three women standing by a meat wagon.

Q. Have you seen them here?

A. I might have seen them, but I didn't recognize them.

Q. Did you see any woman standing right near there by a gate, by an open gate?

A. I don't remember. The reason I remember seeing the women standing by the meat wagon, one of them had her arms up. beckoning at the wagon on the track, as if she wanted to stop her.

Q. I show you Defendant's Photograph, marked Exhibit No. 5. Do you remember seeing these ladies standing there?

A. No, all I remember seeing is the meat wagon standing there with the women around it.

Q. And that is where the two ladies are, at the farthest point. At the time you got back was everything quiet at that time?

A. Oh no, I was there in hardly any time—back there.

Q. There wasn't any train about there then?

A. No, the Valley train had stopped.

Q. And so far as the noise of trains is concerned, it was all quiet about the crossing?

A. Yes, sir

Q. And people had discovered the accident; is that right?

A. I guess so.

Q. You were at farthest—if there was any woman standing there where you see this photograph shows people standing, you were about how many feet from where that photograph shows the woman was standing?

A. What do you mean?

Q. From where this woman is standing here,

in the photograph—you would be right here, on the second track, at the crossing?

A. Yes.

Q. Was the wagon here—the wrecked wagon?

A. Here it was; I see the wagon there, and we tipped it right here from the crossing.

Q. You were in between the Valley track and the D. & H.

A. Yes, sir.

Q. That would be right close to this woman, would it not?

A. It is across the road, 100 feet or more.

Q. Whatever the distance is across the road, would be the distance. Were there other people about there?

A There were some passengers back there.

Q. How many; did you know any of them?

A. No, sir, I didn't.

Q. It is customary when an accident occurs, is it not, to make a report of it to the company?

A. The conductor does that.

Q. And the conductor usually takes the names of all eye witnesses, and people who know anything about the accident?

A, I am not the conductor; I am on the other end of the train.

Q. Aren't you acquainted with the way they go about it, inquiring of everybody on the train what they know about it?

A. We are so far ahead we don't know what is going on back there.

Q. But you don't know a single passenger who was there—how many were out there?

A. I don't know.

Q. Five or six?

A. Yes.

Q. More than that?

A. Yes, there was more than that.

Q. A dozen?

A. I don't know.

Q. They ran back the same as you did?

A. Certainly.

Q. Do you remember seeing some young men get off the hind end of the Lehigh Valley train?

A. No, sir.

Q. You didn't see them?

A. No, sir.

Q. Who helped you lift the wagon around?

A. I don't know who it was—I think he was a foreigner.

Q. Did any of those passengers assist you?

A. Not as I know of—there was just the two of us.

Q. You think you have used about the exact words the woman used to the child?

A. Just the words she used.

Q. And after she told him to holler he began to cry?

A. No, not until he saw the dead boy in the track and then he began to cry.

Q. Did he whoop her up pretty well?

A. No, he cried.

Q. Now this wagon you say, wasn t tipped over, but just shoved aside, shoved around?

A. Yes.

Q. As if it caught the corner of the wagon and shoved it around?

A. Yes.

Q. And the hind end carried around with it?

A. Yes

Q. And the horse was untouched?

A. The horse wasn't touched at all.

Q. Did you hear this woman scream?

A. After I got back there I did.

Q. Did you hear her scream before you heard these words which you say she spoke?

A. Yes sir.

Q. She was screaming before that?

A. Yes sir she was.

Q. Did you hear her scream as your engine went by her?

A. No, sir I didn't.

Q. You were behind the engineer in the cab?

A. No, sir I was on the other side, at the opposite window.

Q. Were you looking ahead?

A. Yes sir, I was.

Q. Straight ahead?

A. Well I was taking in the range, what I could see ahead.

Q. Where were you when you first took your position at that point?

A. At Pittston.

Q. What was your duty?

A. To watch ahead, when not otherwise engaged.

Q. For what purpose?

A. In case of danger.

Q. That is the duty of the engineer also, is it not?

A. Yes, and the fireman too.

Q. Do you have to assist him?

A. In all matters we can.

Q. How far from the crossing were you when you saw the rig?

A. About 400 feet.

Q. And that was right in front of you on that track?

A. No, sir it wasn't in front, it was on the side of the track, just starting over.

Q. On the side of your traek?

A. No, sir, there was another track between us and the rig.

Q. And notwithstanding that you say this woman drove right in front of you?

A. Yes

Q. And got clear across while your train was running 400 feet—was the horse standing when you saw it?

A. Just starting—just commenced to move.

Q. Hadn't come on the track at all?

A. Its head was—just started to move.

Q. What is the semaphore signal for?

A. Train ahead within a certain distance, if it should be up.

WILLIAM HEISTED, Sworn for Defendant.

DIRECT EXAMINATION.

MR. WILL TORREY.

Q. Mr. Heisted, how old are you?

A. About 58.

Q. How long have you worked for the Delaware and Hudson Co.

A. Over forty years.

Q. What is your position with the D. & H. Co.

A. Passenger conductor at the present.

Q. Were you conductor on train No. 13, which had this accident at Smithville crossing, on July 30th 1907?

A. Yes, sir.

Q. What was the first notice you had that there was any danger or any trouble at that crossing?

A. Well, I heard the whistle.

Q. What whistle was that Mr. Heisted?

A. A long whistle.

Q. Where were you at the time?

A. I was sitting in the smoking car.

Q. Was that the front or back of the train?

A. Well in front of the train.

Q. Could you tell what whistle that was?

A. I only noticed a long whistle.

Q. I mean, could you tell what train it was on —could you tell whether it was your whistle or the whistle of some other train?

A. It was our whistle.

Q. Then what did you notice next?

A. I felt the brakes go on immediately.

Q. In what manner were the brakes applied?

A. The brakes were applied firmly, hard; harder than usual.

Q. Then what next happened?

A. Well, the train ran to a stop.

Q. And then you got out of the train?

A. I got out of the train.

Q. How far beyond the crossing did the train stop?

A. Well, the rear end of the train stood probably about four car lengths from the crossing.

Q. How many feet would that be?

A. Well, between two and three hundred feet I should judge.

Q. And then what did you do?

A. I walked back to the crossing.

Q. What did you find there?

A. Well I found the boy that was injured lying in the middle of the track. Before I reached the crossing I saw the woman there excited and jumping around.

Q. What were her motions; describe them a little more particularly?

A. Well, she seemed to be quite excited and bewildered, hardly knew just what to do under the circumstances.

Q. Was she making any noise of any kind?

A. Well, I heard her yes make some noise.

Q. What kind of a noise was it, can you describe it more particularly?

A. Well, she hollered.

Q. Did you hear her say anything?

A. Well, I don't know as I heard her say anything—she was saying something but I could not understand.

Q. Was her clothing torn?

A. Not that I observed.

Q. Did she limp?

A. No, she didn't limp.

Q. Did you see any blood?

A. I saw no blood.

Q. Did she complain of any injuries she received?

A. I didn't hear her enter any complaint.

Q. You say you have been on the road for how long—upon that division, and particular run?

A. I have run the passenger trains for 20 years.

Q. That is between Wilkes-Barre and Scranton?

A. Well not altogether on that one run, or one division.

Q. About what proportion of your time have you been over that particular part of the road?

A. Eighteen years anyhow.

Q. You mean for eighteen of those twenty years?

A. Yes sir.

Q. And you are very well acquainted with the road then, of course?

A. Yes, sir.

Q. You have seen trains passing, as you have gone back and forth on that road?

A. Yes.

Q Have you ever seen a train going south on the most easterly track—what is known as the 4th track?

A. Not that I recollect of.

Q. Would you remember it if you have seen it?

MR. SHERWOOD:

I object.

THE COURT.

That is about all he could say, that he never recollects seeing any.

MR. TORREY

Q. Was there any train standing on that fourth tract at that time?

A. No, sir.

THE COURT.

That is on the east track.

MR. TORREY.

On the east track.

CROSS EXAMINATION

MR. SHERWOOD.

Q. Which got back to the point of the accident first, you or the last witness who was sworn?

A. Well, I don't know.

Q. You were there together, of course, anyway?
A. I saw him there.

E. A. WONNACOTT, sworn for Defendant.

DIRECT EXAMINATION.

MR. WILL TORREY:

Q. Mr. Wonnocatt, how old a man are you?
A I will be forty-eight the 20th of June?
Q. What is your position with the Delaware & Hudson Co.?
A. Train Baggage Master.
Q. How long have you held that position?
A. About 20 years.
Q. Were you on this train No. 13, on the 30th of July 1907?
A. I was.
Q. Which had this accident at the Smithville crossing?
A. Yes, sir.
Q Will you tell us what you know of this accident?
A. The first I knew of the accident, or anything pertaining to it, was the hearing of the whistle; I heard the whistle, quite an unusual whistle which called my attention, and immediately the brake went on, and in those cases I usually go to the other side of the car and look out as I pass, as we came over the crossing I heard some one scream, I could not tell whether it was a woman or who. I said to myself "we got somebody" I looked out the left side of the car, and I saw the wagon left lying along the track, and when the train stopped, I put on my mittens and went back to the wreck.
Q. What did you find when you got back there?

A. The first I found was the boy lying in between the rails of the north bound track, lying in between the ties, cross ways.

Q. Did you see Mrs. Flannelly there?

A. I did.

Q. What were her actions?

A. Well, she was screaming and hollering and yelling at an awful rate.

Q. Did you notice whether her clothing was torn?

A. I did not.

MR. SHERWOOD.

We don't make any claim for clothing here Mr. Torrey.

THE COURT.

Q. The train had passed over this little boy that was on the track?

A. Yes the whole train passed over him. He lay between the ties here, the same as this is the ties (indicating). He lay in here between the rails of the north bound track.

MR. TORREY.

Q. Did you notice any bruises on Mrs. Flannelly?

A. Not in the least.

Q. None at all?

A. Not any.

Q. Did you notice whether she limped?

A. I could not tell whether she limped or not, she was jumping around and yelling so—I didn't notice any limping though.

Q. Did you hear her complain of any injuries?

A. Nothing at all.

Q. Did you see any train standing on the east track at that time?

A. That is the 4th track?

MR. SHERWOOD.

I object to the form of the question.

THE COURT.

I see no serious objection to it.

A. There was no cars on that 4th track at all.

MR. TORREY.

Q. Did you ever see any train running south on that track?

A. No, sir.

MR. SHERWOOD.

I don't see how that is material.

MR. TORREY.

Q. Was there a train running south on that track that day?

A. No sir, not unless it was under special orders, or a flag—somebody might be using that track, and left a flag, for a certain distance, and back up.

THE COURT.

Q. Was there a train on it that day, that you saw, this easterly track?

A. No, sir.

CROSS EXAMINATION.

MR. SHERWOOD.

Q. Which got back to the crossing first, you or George Mason?

A. I think George Mason—I am not positive.

Q. You didn't think Mrs. Flannelly was acting rationally when you got back there, did you?

A. I don't know what you would call it; she acted as if it was hysteria.

Q. She acted as if she was virtually in a fit?

A. No, she didn't act as if she was in a fit.

Q. Did you see her down, at all?

A. No, sir.

Q. Just dancing around?

A. Just jumping around and holleriug.

Q. Pulling her hair?

A. No, sir, she wasn't pulling her hair.

Q. Not pulling her hair at all?

A. No that I saw her.

Q. How long were you there?

A. We were there possibly three to five minutes altogether, backing up, and picking up the boy. I devoted my attention mostly to the boy, in picking him up.

WILLIAM HEISTED, Recalled by Plaintiff For Further

CROSS EXAMINATION.

MR. SHERWOOD.

Q. It is customary when an accident occurs for the conductor to report the facts to the company, is it not?

A. Yes, sir.

Q. Make a written report?

A. Yes sir.

Q. And in doing so, you inquire the names of all, or as many as you can get who were near by at the time and had any knowledge of the accident, do you not?

A. Those that we know, or think has any knowledge of it, yes sir.

Q A number of passengers were upon this train that struck these people, were there not?

A. Yes, there were passengers.

Q. And they went back to the crossing, as well as you and Mr. Mason, and the other train crew, did they not?

A. Yes sir, some of them did

Q. And they had an opportunity of seeing and hearing what was said and done, after the accident occurred at least, as well as you?

A. Well,—they could see about as much as I could, those that were there to see.

Q. And hear just as well of course?

A. Well—

Q. If it were known that any of the employees in charge of a train violated or neglected a duty, would they not be disciplined by the company which employs them—your company?

A. Under some circumstances, generally so.

Q. If for instance it became known to the company, that the blowing of a whistle required, was neglected, would the party so responsible for that neglect, not be at least reprimanded?

A. Yes, they would

Q. Possibly disciplined?

A. Well not quite so severe as that.

Q. It would depend upon how many times it was repeated?

A. They would be notified of the neglect.

RE-DIRECT EXAMINATION.

MR. TORREY.

I don't know how much importance this is, your honor, if it is of any importance, it can be used as an argument to the jury. We would like to put in the conductor's report,

and would like to show what inquiry he made as to the knowledge of any whose names he reported. It seems to me that we are going very far a-field with that; these passengers were inside the car, and could see nothing of the accident at all.

Q. Mr. Heisted, is this a report which you made of that accident?

A. Yes sir.

MR. TORREY.

I haven't read it over, but I will take the risk of offering it in evidence.

(Marked "Defendant's Exhibit No. 8")

RE-CROSS EXAMINATION.

MR. SHERWOOD.

Q. When was this report written?

A. Immediately after the accident; as soon as I had an opportunity to write, probably that same afternoon, as we are required to get the report in the same day

Q Is it all in your hand writing; look at it please?

A. The report is in my hand writing, except the signature here which I think is not mine.

Q. What is that calculated to be for—that signature?

A. I think that is Milo Gardner's, the engineer's.

Q. You both have to sign it?

A. Yes sir.

MARTIN CRIPPEN, Sworn for Defendant.

DIRECT EXAMINATION

MR. TORREY.

Q. Mr. Crippen, you are claim agent of the Delaware & Hudson Company for the Pennsylvania Division, are you not?

A. Yes, sir.

Q. And as such you have charge of the preparation of this case?

A. Yes, sir.

Q. Was this report of this accident, signed by Mr. Heisted and Mr. Gardner (Exhibit No. 8) placed in your hands, as such agent?

A. Yes sir.

Q. Do you find upon that report the names of any witnesse who are mentioned?

A. Yes, sir, I find the names of three; the first one being Mrs. Flannelly, who I take to be the plaintiff, and Mrs. John Jumper, whose residence is given as Mount Pocono, and Frank Howley, whose address is 358½ North Hyde Park Avenue. I went to Mt. Pocono and made diligent inquiry, and was unable to locate Mrs. John Jumper as a resident of that country; I called at 358½ North Hyde Park Avenue and saw Frank Howley who informed me—

MR. SHERWOOD.

I object

MR. TORREY:

We offer to show that upon consulting him, he ascertained that he knew nothing of the accident which would throw any light upon it for either side, and therefore didn't subpoena him.

MR. SHERWOOD.

I object to the offer for the reason that I don't want him to pass upon whether a witness interviewed by him is competent to throw light upon the ptaintiff's side of the case; and I further object that it is heresay evidence, immaterial, irrelevant and incompetent, and therefore inadmissible.

THE COURT

Q. You interviewed this witness?

A. I found the witness but didn't subpœna him.

THE COURT.

Q. Why not?

A. Because he could give me no information in regard to the manner in which the accident happened

MR. TORREY

Q. Do the names of any other witnesses appear on the report?

A. No other witnesses, except the three named.

Q. How much time have you spent, yourself, in an endeavor to find witnesses who did know about the accident, and have them subpoenaed?

MR. SHERWOOD.

I object to the question.

MR. TORREY.

I withdraw the question, if you object to it.

Q. How long have you been connected with the Delaware & Hudson Company?

A. Since June 1889.

Q. Do you know anything about this 4th or slow track, as it is called?

A. Yes sir.

MR. SHERWOOD.

Make your offer.

MR. TORREY:

We offer to show by the witness on the stand, if he knows, the time when this 4th track was built; and we offer to show by him the purposes for which it was used in, and previous to July 1907, and the reasons for the change which was afterward made, removing the slow track to the westerly of the three tracks, instead of the easterly; those reasons being that prior to the time of the change, the heaviest traffic upon the road was toward the north, and the supplemental track was necessary to move the heavier part of the traffic; that by reason of the increase of exchange traffic with the Pennsylvania Railroad Company, the bulk of the traffic some time toward the end of 1907 grew to such proportions as to be in excess of the north-bound traffic, and that therefore the slow track was to be used thereafter for a south-bound instead of for north-bound track; it was therefore moved over to the west so as to connect with the south-bound main track, it having previously connected with the north-bound main track.

MR. SHERWOOD.

No objection.

MR. TORREY.

Q. Do you know, Mr. Crippen, when the 4th or most easterly track of that road was built?

A. I could not tell you Mr. Torrey exactly: it

has been in operation a number of years—some time in the early nineties.

Q. Do you know for what purpose it was constructed?

A. To relieve the burden of traffic north, which was the heaviest; heavier than the south.

Q. What traffic passed over that track?

A. Second class trains; to clear first class trains and keep them moving.

Q. Second class trains in what direction?

A. North—It was a north bound track; an additional north bound track.

Q. Whether to your knowledge it was ever used for a south bound track?

A. Never, it was impossible to use it for a south bound track, except upon special order.

Q. Will you explain why it was impossible?

A. Because the drift of traffic was north, and of course it would conflict with anything in the opposite direction, except by special order, and special arrangement.

Q. Do you know when the supplemental track, we will call it, for the present time being, which was previously the easterly track, was transferred over to the west?

A. Within the last four months.

Q. Will you tell us the occasion for that change?

THE COURT.

What change is that?

MR. TORREY.

The easterly track was the supplemental or slow track before; the westerly track is now; the switch being in about the same place, only being a switch out of the south bound main line now, instead

of out of the north bound line as it was before,—and I asked the purpose of that change.

A. The burden of traffic has somewhat changed, it is now south—I mean the new tracks and new arrangement—the moving of coal and freight.

Q. Why did that occasion the change?

THE COURT

Q. Now the east bound track has become one of the main tracks?

A. No. Now become a north bound track.

Q. Of the main line?

A. Yes, sir.

MR. TORREY.

Q. Why did that occasion a change?

A. There is a heavy grade from Yatesville in that direction, and the greatest burden of loaded cars being in that direction, it facilitates operations by having the slow track or accelery track connect now with the south bound.

Q. I don't think you quite caught the idea. Why couldn't they use that easterly track as it was before, for south bound traffic, just as well as they used it for north bound track?

A. Because it cuts into the north bound track more than a mile away from the cross over, which would necessitate the operation of it as a single track between the cross over and the switches, and would interfere to a great extent, and would very much hinder operations,

Q. In other words, when it is used for north bound, it must run into the north bound track, which is the easterly of the two?

A. Yes.

Q. And when used for south bound, it must run out of the westerly -

A. Yes, sir, it must conform to the drift of of traffic.

CROSS EXAMINATION

MR. SHERWOOD.

Q. Do you know whether or not the changes in the location of tracks were taken up before the Board of Directors?

A. I know they came here from the General Manager, I presume, to consult—

Q. At the board meeting?

A. At the board meeting, yes.

Q And a report is kept by the secretary at those meetings, is there not?

A. I take it, that that is true.

Q. That report would naturally set forth both the change and the reason for the change, would it not?

A. Well, I don't know; I should say so.

MR. TORREY.

Q. Do you know anything about the board of directors or their methods of doing business?

A. Not particularly, no.

LEWIS POTTER, Sworn for Defendant.

DIRECT EXAMINATION.

MR. TORREY.

Q. Mr. Potter, where do you live?

A. Carbondale.

Q Your occupation is what?

A. Passenger trainman, Delaware & Hudson Company.

Q. You were trainman on this particular train No. 13 on the 30th of July, when this accident occurred?

A. I was.

Q. Will you tell us what you know about it?

A. The first I knew of it was, I heard the sound of a whistle, felt the brakes go on the train, and I knew that our engineer was trying to stop, and I next heard a scream—sounded from the side of the train; looking out the side of the train I saw parts of a wagon on the opposite track, and realized there had been an accident. I hurried to the back of the train, and took my red flag and started back along the track. I found a small boy lying in the track; looked as if he was dead. I knew that he would be cared for by the rest of the crew, and I went on down the track to protect the rear of the train.

CROSS EXAMINATION.

MR. SHERWOOD.

Q. You hurried back, you say?

A. Yes sir.

Q. Were you on the rear of the train when you started?

A. I was in the next car to the rear, the second car from the rear of the train.

Q. Then you must have been about the first one back to the crossing?

A. I was the first one back.

Q. And, did you assist Mr. Mason in removing the wagon?

A. I did not, sir.

FLETCHER HOSIER, Sworn for Defendant.

DIRECT EXAMINATION.

MR. TORREY.

Q. Mr. Hosier, where do you live?

A. I live in West Pittston—24, West Pittston —Washington street.

Q. What is your business?

A. Lehigh Valley Freight Conductor.

Q. What was your run in July 1907?

A. My run was a mine run, between Coxton and Heidelberg colliery.

Q. That is a branch which is run from the Coxton yards?

A. That is a branch—we run on the mountain cut-off to Heidelberg No. 1 colliery, and then we switch off on the Heidelberg branch.

Q. You mean No. 2, don't you?

A. No, Heidelberg No. 1, we switch to the Heidelberg branch.

Q. Where does that run to?

A. No 2 colliery, about a mile from the Lehigh Valley tracks.

Q. One of the collieries is north of the crossing, and the other south,—which is it? which is which?

A. Number One is north of this crossing and No. 2 is south.

Q. Does the branch end at No. 2 collery?

A. Yes, sir.

Q. What trains run over it?

Q. The Heidelberg mine runs, and occasionally a special car with officials goes up there.

Q. How many trains a day are there over it?

A. Generally—the one engine is generally all the trains goes over that branch; they make a trip to the colliery and away from the colliery—sometimes they make two trips.

Q. Will you tell us whether you were on a train going over that branch on the 30th of July when this accident occurred?

A. Yes, sir, I was on the engine, that is, coming from No. 2 colliery, when this accident occurred.

Q. You were going north then?

A. Yes, we were coming north.

Q. Just tell us what if anything you saw of the plaintiff, Mrs. Flannelly?

A. Well, we crossed the crossing; after we got over the crew flagged—the crew behind flagged us out on the train, and flagged us; I was riding in the tender of the engine, and we stopped, and went back to this crossing; and we saw the lady sitting at the crossing, she was crying and going on.

Q. You did not see anything of the accident itself?

A. No, sir we didn't see the accident.

Q. Did you notice her at all, as you went up, or as you went over the crossing, coming north?

A. My attention was mostly called to that butcher wagon on the other side of our train; I was up on the rear end of the tender, and my attention was mostly called to that butcher wagon on the other side of us—on the left side—before them houses.

Q. On the left side?

A. Yes, toward them houses.

Q. You didn't notice Mrs. Flannelly then, as you went across the crossing.

A. I noticed a horse on the other side, but I didn't take any particular attention.

Q. Could you tell how near it was to the tracks?

A. No, I couldn't say that.

Q. Was it standing still or moving?

A. It looked to be moving at the time I saw it.

Q. If you passed any trains there, tell us what trains you passed?

A. We passed the Central train there just as—well, the Central caboose got about the length of our engine over the crossing when we come on to it.

Q. What track was that train on?

A. On the track next to the Lehigh Valley Heidelberg branch.

Q. Whether there were any cars or trains upon the further D. & H. track?

A. No sir, not in sight, around here that I seen?

CROSS EXAMINATION.

MR. SHERWOOD.

Q. It was a butcher wagon standing right there ready to cross over, on the opposite side?

A. The butcher wagon was standing over next to the houses.

Q. As if waiting to cross?

A. Yes; I could not say whether they were waiting to cross or not, but when our engine came along there this horse shied—the butcher wagon, and my attention was called to it.

Q. Came near getting hit?

A. No, sir.

EDWIN F. HUFSMITH, sworn for Defendant.

DIRECT EXAMINATION.

MR. WILL TORREY.

Q. Mr. Hufsmith, where do you live?

A. 615 Susquehanna avenue, West Pittston.

Q. What is your occupation?

A. Lehigh Valley Locomotive Engineer.

Q. What train were you running on July 30th, 1907?

A. I was running what they call the Heidelberg Mine Run.

Q. You were on the same train Mr. Hosier was on?

A. Yes.

Q. And you were the engineer of that train?

A. Yes.

Q. Tell us what you saw of this accident?

A. Well,—in fact I didn't see anything of the accident.

Q. You were too far up the road, were you?

A. Yes sir we had passed over the crossing.

Q. As you were going over the crossing, did you notice Mrs. Flannelly's rig on the east side of the crossing?

A. As we were coming down to the crossing, we were passing this Central train, and before I got on to the crossing, their caboose had come over perhaps the length of my engine, I saw a rig across the crossing, coming toward the track, through the cab window. I also saw the rig straight over the boiler, in passing the crossing,—the rig was then in motion I believe.

Q. Did you see any train standing or moving on the easterly track—the D. & H. track, at that time, what is known as the 4th track?

A. No, I didn't.

MR. SHERWOOD.

NO CROSS EXAMINATION

T. F. KELLY, Sworn for Defendant.

DIRECT EXAMINATION.

MR. WILL TORREY.

Q. Mr. Kelly, where do you live?

A. Pittston.

Q. What is your occupation?

A. Flagman.

Q. For what company?

A. Lehigh Valley.

Q. Were you on this same Lehigh Valley train?

A. Yes sir.

Q. On the 30th of July 1907?

A. Yes sir.

Q. What part of the train were you?

A. I was on the hind end.

Q. On the last car—in the caboose?

A. I was in the caboose, yes sir.

Q. Will you tell us what you saw of this accident?

A. Well, when we come over that crossing—it is a pretty heavy grade, coming down in there, and we most generally give the hand brakes on the engine; I was out, up on the brakes when I heard the screams of this woman, and that called my attention back to the rear end of the caboose. When I went back to the rear end, Mrs. Flannelly was on the crossing then, and she had a hold of the reins holding the horse, and it appeared as if she wanted to back the horse off the crossing, to me, it looked that way; and the little boy sat on the other side of her, hitting the horse with the whip.

Q. Which boy was that?

A. Her son—the other boy got killed.

Q. Where did he sit?

A. The other boy sat in the rear end of the wagon when I saw him; he ran to the rear end, the second time, when the engine hit him.

Q. Did you see Mrs. Flannelly?

A. I saw Mrs. Flannelly and her son jump out of the wagon and land on her feet, and after that I

didn't pay any more attention to her; I was watching the little boy that got hit with the engine.

Q. Did she fall?

A. I don't know, she landed on her feet, but after that I gave her no more attention; after that I didn't see what became of her, and I watched the little boy in the back end of the wagon.

Q. How far was the passenger train from Mrs. Flannelly when you heard her scream?

A. Oh, probably—just after he blew that long whistle—must be five or six hundred feet back. If she had left the horse go I think she would have made it all right.

Q. Was there any train either moving or standing still on the most easterly track, what is known as the 4th track of the D. & H.?

A. No, sir, there was nothing on the 4th track.

CROSS EXAMINATION.

MR. SHERWOOD.

Q. The horse seemed to hesitate or stop there?

A. Yes, and she seemed to hold the reins.

Q. And some one used the whip on him?

A. Yes, the little boy used the whip—on the other side.

Q. And you think that hesitation, that stop of the horse, from whatever cause it may have been, is what caused her to get caught?

A. Yes, sir.

H. S. COOK, sworn for defendant.

DIRECT EXAMINATION

MR. WILL TORREY:

Q Mr. Cook, what is your occupation?

A. Locomotive engineman for the Lehigh Valley.

Q. Were you on the Lehigh Valley train going over the crossing on the 30th of July?

A. Yes, sir.

Q Where were you on the train?

A. In the tank of the engine—in the tender.

Q. What was your occupation at that time?

A. Fireman at that time.

Q. What did you see of this accident?

A. Well, as we approached the crossing, coming from No 2, we passed a Central train going south, and it cleared the crossing about a little before we come on to it, I should judge a few car lengths; then I looked across the crossing, and I seen a horse and wagon, and three parties into it.

Q. What were they doing?

A. It looked to me as if they were coming towards the D. & H. track.

Q. Moving or standing still?

A. It looked to me as they were moving.

Q. What did you see next?

A. That is all I seen.

Q. Were there any trains moving or standing still on the most easterly track of the D. & H., known as the 4th track?

A. I didn't see any.

CROSS EXAMINATION

MR. SHERWOOD.

Q. How long was your train?

A. Well, I would say, may be 12 to 14 coal cars.

Q. Were they the large coal cars or small?

A. Large coal cars.

Q. About 33 feet long?

A. Yes 34 to 36.

Q. And 12 to 14 cars?

A. I would judge that.

Q. And you were on the engine?

A. Yes.

Q. And the Jersey Central freight had passed the crossing when you got at the crossing, so that you had an opportunity of viewing this rig on the other side?

A. Exactly.

Q. By the way, your train was pulling slowly?

A. Very slow, not over 6 or 8 miles an hour.

Q. And the Central was pulling along at a pretty good gait, was it not?

A. I couldn't tell you, we were going in an opposite direction; I couldn't tell you that; they were moving though; I couldn't tell their speed.

Q. As a trainman do you think you could give any evidence as to what speed they were moving?

A. Well, not over 10 mile an hour

RE-DIRECT EXAMINATION.

MR. TORREY.

Q. Do you say your engine was going head on?

A. Backwards.

Q. The tank was in front?

A. Yes, the tender.

JOHN GALLAGHER, sworn for Defendant.

DIRECT EXAMINATION

MR. TORREY.

Q. Mr. Gallagher, what is your occupation?

A. Brakeman.

Q. For what company?

A. Lehigh Valley.

Q. Were you on this Lehigh Valley train which has been spoken about?

A. Yes sir,

Q. What part of the train were you on?

A. I was on the center of the train, or about 6 or 7 car lengths away from the engine.

Q. Did you see anything of this accident?

A. No, sir, only after it happened I went back and saw it.

Q. Did you notice whether there was any train standing or moving on the most easterly track of the D. & H. known as the No. 4 track?

A. No. sir.

Q Do you mean you didn't notice?

MR SHERWOOD.

I object.

THE COURT

Q Was there any train on the easterly track?

A. I didn't see any.

MR. SHERWOOD.

NO CROSS EXAMINATION

THE COURT.

Q. You say you went back after the accident—what did you see then?

A. I saw the body lying between the rails—and the wagon wrecked, and the woman there screaming.

Q. Did you see Mrs. Flannelly?

A. Yes, sir.

Q. What was her condition?

A. Why she was screaming, and swinging her hands around there.

MR. SHERWOOD.

Q. Did you see Mr. Mason?

A. Yes, sir, I seen him.

Q. Did you see him lift the wagon around, and assist him?

A. No, I think the wagon was lifted around when I got back there.

WILLIAM DOYLE, Sworn for Defendant.

DIRECT EXAMINATION.

MR. TORREY:

Q. Mr. Doyle, you are in the employ of the Lehigh Valley?

A. Yes sir.

Q. In what capacity?

A. A brakeman.

Q. You were on this Heidelberg branch train on the 30th of July?

A. Yes sir.

Q. What part of the train were you?

A. I was on the first car, next to the engine.

Q. What if anything did you see of the plaintiff here, Mrs. Flannelly, or the accident?

A. I saw the wagon on the other side of the track.

Q. As you passed it?

A. As we were going down, yes.

Q. Was it standing still, or moving?

A. I didn't take much notice, I couldn't say.

Q. You didn't see the accident, I suppose?

A. No, I didn't see the accident.

Q. Did you go back?

A. I went back.

Q. What did you see when you went back?

A. Well, I saw the little boy lying between the tracks, and the woman running around, there scream-

ing, running around, and pulling her hair, and throwing her hands.

Q. Did you see any blood or anything on her?

A. No, sir.

Q. Whether there was any train, or cars, upon the most easterly track of the D. &. H.—furthest from you?

A. No sir, there wasn't any there.

Q. You passed a Central train?

A. Yes, sir.

Q. What track was that on?

A. Going south, next track to ours.

CROSS EXAMINATION.

MR. SHERWOOD.

Q. As you approached the crossing, between the track that you were on, and the most easterly track, was the Jersey Central train going south?

A. Yes sir.

Q That was a train of freight cars?

A. Well, it was a mixed train, some freight, some box cars, and coal cars.

Q. Of course you were not thinking anything about trains or accidents at that time?

A. No, sir.

Q You were occupied with your own customary business, on your own train?

A. Yes, sir.

Q. And you were on the head car?

A The car next to the engine, yes.

Q. And just as your engine got to the crossing, or a little before, this Jersey Central train,—the hind end, passed the crossing, as I understand?

A. Yes.

Q. So that you were past the crossing before

the Jersey Central was away from between you and the track over on the east?

A. We was past the crossing?

Q. Yes, you were on the car next to the engine?

A. Yes.

Q. Now, when you came back to the crossing did you see Mr. Mason there?

A. I didn't recognize him at that time—I saw the fireman there.

Q. You recognize him now as being one that was there at that time?

A. Yes, sir.

Q You say you saw the woman pulling her hair and screaming?

A. Well, she was screaming and throwing her hands up.

Q. Up about her head?

A. Well, she was going through all movements, couldn't tell hardly what she was doing.

Q. Something like some one frantic?

A. Yes.

Q. Did she act as though there was a pain somewhere in this region?

A. I don't know; she went through all kinds of movements just like somebody.

Q. That was crazy?

A. Well, excited, yes.

Q. Crazy with excitement, do you mean that?

A. Well, she was excited, I suppose, on account of the accident.

Q. When you were there of course you were not thinking about anything, except the injured people, after the accident happened? Your attention wasn't drawn to anything else in particular?

A. No—well, there didn't seem to be anybody else injured only the little boy.

Q. The accident, everybody was talking about it, and looking at it, and you with the others went away?

A. Yes sir.

Q. How long were you there?

A. About five or ten minutes.

Q. And when you went away, they all went on their way?

A. Yes we all went.

H. E. BARTHOLOMEW, Sworn for Defendant.

DIRECT EXAMINATION

MR. TORREY.

Q. Mr. Bartholomew, where do you live?

A. Mauch Chunk.

Q. What is your occupation?

A. Conductor.

Q. For what company?

A. Central Railroad of New Jersey.

Q. You occupied that position last July, did you?

A. Yes, sir.

Q. Were you upon this freight train which passed the Smithville crossing on that date?

A. Yes sir.

Q. About the time of this accident?

A. Yes, sir.

Q. What freight train is that—has it any name or number or anything?

A. No. 52.

Q. And what is its run?

A. They generally haul all kinds of freight, rough, and perishable freight, all the way through.

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Q. Where did your train start from that day?

A Scranton.

Q. And what was its destination?

A. Mauch Chunk.

Q. About what time did it reach this Smithville crossing?

A. Well, I should judge about 10 minutes to 11, or somewhere around there.

Q. What track were you on?

A. The south bound track.

Q. Which of the three is that, the east, west or middle—at that time?

A. I don't know which you would call east or west there.

Q. The west is toward the red row, the Lehigh Valley we call west?

A. Well, that is the track where we were.

Q. Next to the Lehigh Valley branch—the Heidelberg branch?

A. Yes sir.

Q. Will you tell us what, if anything, you saw of this accident?

A. Well I heard this passenger train blow a sharp whistle, which they do in a case of some body pulling over a crossing; this drawed my attention to it, and I happened to look out of the back door.

Q. Where were you then, were you in the caboose?

A. On the back end of the caboose, in front of the door.

Q. Where was it when you heard that whistle, with reference to the crossing?

A. About 200 or 250 feet on the other side of the crossing.

Q. Well, what did you do, and see then?

A. I seen—all I seen was a wagon approach over the crossing, and I seen a man and woman getting out of it—I seen that they were clear of the other track, and we never stopped, I left them go on; that is all I seen of the two in there.

Q You say you saw a man and woman getting out?

A. Getting out, yes.

Q. Where was the wagon when you first saw it?

A. When I first saw it, they just started to cross the crossing.

Q. Did you see the wagon when it was struck?

A. Yes, sir.

Q. Whether it is was before, or after it was struck, that the woman got out?

A. She got out before the wagon got struck.

Q. How did she get out?

A. Jumped out, jumped on her feet.

Q. Whether she fell, or not?

A. No, sir, she didn't fall.

Q. Can you tell us whether there was any cars or train upon the easterly track of the D. & H.—the furthest from you?

A. No, sir.

Q. Your train didn't stop?

A. No, sir.

CROSS EXAMINATION.

MR. SHERWOOD.

Q. You were in the caboose, were you?

A. On the back end of the caboose.

Q Looking out toward the crossing?

A. Yes sir?

Q. Whereabouts was your train when you first took that position?

A. Why we were just about getting over the road crossing when I heard the whistle of this passenger train—I knew the passenger train was due there.

Q. Had you got to the road crossing yet?

A. No, we were just going over the road crossing.

Q. And at that time—Well what part of your train was just going over the crossing?

A. The hind end.

Q. And at that time,—that moment, when the hind end of your train was going over the crossing, you heard that whistle?

A. Yes, sir.

Q. And that was about 200 or 250 feet the other way?

A. Yes, sir.

MR. TORREY

He said it was 200 or 250 feet over the crossing.

MR. SHERWOOD.

I didn't so understand him.

Q. And you were in the hind end of the caboose, looking out of the hind end?

A. On the hind end of the caboose, not in the caboose,

Q. You were looking at the crossing?

A. Yes.

MR. TORREY.

Q. I want to get it clearly in my mind what you mean by that distance of 200 or 250 feet. What distance does that describe?

A. Well, that was the far away from the crossing.

Q. What?

A. The caboose, when this happened.

MR. SHERWOOD.

Q. I understood you to say that is the distance you thought the train was when it blew the danger whistle?

A. No.

Q. How far do you think the Lehigh Valley train was from the crossing when it began to blow the danger whistle?

A. I didn't take any attention to the Lehigh Valley train at all.

Q. I mean the D. & H. train that did the damage?

A. Well I could not exactly tell how close it was, but a train going one way, and the other in the other direction, it don't take long to go a short distance.

W. F. KREBBS, Sworn for Defendant

DIRECT EXAMINATION.

MR. TORREY JR.

Q. Mr. Krebbs, what is your occupation?

A. Flagman.

Q. For what road?

A. Jersey Central.

Q. Was that your occupation last July?

A. Yes, sir.

Q. And you were on this Jersey Central train?

A. Yes, sir.

Q. You were on this Jersey Central train that went over this crossing on the 30th of July 1907?

A. Yes, sir.

Q. What direction were you going?

A. Going towards Pittston.

Q. On what track?

A. On the south bound, I think they call it.

Q. What track is that—is it the most westerly track—the most westerly of the three tracks?

A. Yes, sir.

Q. What part of the train were you?

A. In the caboose.

Q. Inside the caboose.

A. Yes sir.

Q. As you went over this crossing, how far—Did you see this accident that happened?

A. I seen part of it yes sir.

Q. What part of it did you see?

A. I seen the woman and the boy jump out of the wagon, before it was hit.

Q. Was that the first you saw?

A. I saw the horse on the other side of the crossing, while we were going by—two boys and a woman in.

Q. Where did they stand—or did they stand?

A. Right in the idle track, when I seen them.

Q. What do you mean by the idle track?

A. The fourth track.

Q. Did you see them start to move from that position?

A. After we went over the crossing, yes.

Q. How far over the crossing had you gone when they started to move?

A. Not very far—a couple of cars.

Q And then did you see the D. & H. train coming down there.

A. No sir, not right at that time—I heard her blowing though.

Q. What did these people do, will you explain more fully, as they came across the track?

A. The woman jumped out, and the boy on the other side; the woman jumped out on the left hand side and the boy on the right.

Q. Did you notice whether she landed on her feet?

A. Yes, she landed on her feet.

Q. Did you notice whether she fell down or not?

A. No sir she didn't fall down, not as I could see.

Q. Was there any train standing or moving on the 4th track of the D. & H., the most easterly track?

A. No sir, there was nothing on it?

CROSS EXAMINATION.

MR. SHERWOOD.

Q. The time you saw the woman and the two boys in the wagon, what part of the wagon were they in?

A. In front part of the wagon.

Q. Sitting on the seat?

A. Yes sir.

Q. The woman in the middle, and a boy on one side.

A. No, the woman was on the end.

Q. Did you see her stand up in the wagon?

A. I seen her jump out.

Q. Did you see her standing up, holding the horse?

A. No, sir.

Q. You saw the horse stop?

A. I saw the horse stop, yes.

Q. On the second track?

A. Yes.

Q. You think if the horse hadn't stopped on the second track you think they would have got over?

A. Yes sir.

Q. So it was that delay of the horse at the second track—that few moments delay, that allowed her to be caught?

A. Yes sir.

Q. And it was while that horse was stopped on the second track you heard the whistle of the engine?

A. He whistled the second time, when he went by us.

Q And in a moment the accident happened?

A. Yes, sir.

Q. Did you go back after the accident?

A. No, sir, we didn't stop.

Q. You went right on down, on your way?

A. Yes, sir.

MR. TORREY:

Q. You said he whistled the second time; when did he whistle the first time?

A. He whistled up at the viaduct; blowed his regular crossing whistle up there.

MR. SHERWOOD.

Q. Did you hear any other whistle before that?

A. No, sir.

Q. Did you hear your own train blow the whistle for that crossing, by the viaduct?

A. Well, but that was on the other side of the crossing, though.

Q. Can you tell whether it was on the first track or third where the whistle was blown, couldn't you?

A. Yes, sir.

M. F. RICHARDS, sworn for defendant.

DIRECT EXAMINATION.

MR. TORREY.

Q. Mr. Richards, you were the engineer on this Central Railroad freight train?

A. Yes sir.

Q. As you went over this Smithville crossing, did you notice this plaintiff at all?

A. I noticed the team standing on that side of the crossing, of the D. & H. road.

Q. That is on the easterly side?

A. On that side over toward the Valley cut-off —they were coming from Avoca, or coming from that way.

Q. And about how near the track were they standing?

A. I should judge they were about 10 feet, something like that from the track.

Q. From the nearest track to them?

A. Yes.

Q. Were there any cars moving, or standing, on that track nearest to them?

A. No, sir.

Q. Did you pass any, as you went on down, on that track?

A. On the D. & H. you mean?

Q. On the slow, D. & H. track?

A. I passed a D. & H. passenger train.

Q. I mean on the 4th track, did you pass any?

A. No, sir.

Q. Did you notice particularly, how they were sitting in the carriage, as you went past?

A. No, sir, I didn't notice particularly. I

could see the horse's head, and a lady's head, sitting in the rig, and I was going on, with our train.

Q. Now what did you first observe or know of the D. & H. passenger?

A. I noticed the D. & H. passenger coming up on the straight line, on this side of Brown's crossing there, I think that is the crossing, and it runs in my mind, after I cleared this crossing, where this rig was standing.

MR. SHERWOOD.

I object. You needn't give us the operation of that mind of yours.

MR. TORREY.

Q. Tell us what you saw of the passenger train?

A. I saw the passenger coming in on the straight line, on that upper crossing, and I was looking back, and I heard this D. & H. train whistle.

Q. Where?

A. Just about seven or eight hundred feet above the crossing, where the rig was struck, right a little ways above my engine I heard them whistle, and I looked back, and I saw them just about over the crossing.

Q. How is that with reference to the usual place for the crossing signal?

A. How is that?

Q Where is the usual place for the crossing signal there?

A. I should judge about 750 feet or something like that.

Q. Is that where they blew—that is what you mean?

A Yes, right there.

Q. What sort of a whistle did they blow?

A. Two long and two short.

Q. Well, what more did you see?

A. Then I looked back, and I saw about three car lengths I should judge over the crossing, and I saw the horse starting out and get on the outside track, the first track, where they stopped, and I saw a lady jumping out of the rig, and she thrown her hands up, and that moment then came the train and picked the rig up; I saw the train hit the rig, and I kept on looking back, and I saw the lady standing about where she had jumped out of the rig, holding her hands up like this (indicating.)

CROSS EXAMINATION.

MR. SHERWOOD.

Q. You didn't stop your train at all?

A. No, sir.

Q. How rapidly was your train running?

A. Making about ten mile an hour.

Q. And you were the engineer?

A. Yes sir.

Q. And you were on the right hand side of your engine of course in your proper place?

A. Yes sir.

Q. And your duty calls you to look ahead of your engine, doesn't it?

A. Yes sir.

Q. And, of course, you were attention to your duty?

A. Well, while I was looking ahead, I saw this rig standing there on the crossing, and it run in my mind if she understood to drive across, she would be picked up with this train, and I was looking back then toward the crossing.

Q. When you saw that train comir g you thought

if anybody undertook to go across there, they would get picked up?

A. It run in my mind; I saw the train coming, and I looked back.

Q. And you kept watch on it all the way back until the accident happened?

A. Not all the time—I wasn't looking back all the time.

Q. You kept watch of the crossing?

A. I looked back about the time I thought my train would be over the crossing, and I saw the D. & H. train coming, and I heard them whistle, and I looked back again, and I seen them start the horse out, and a lady jump out of the rig, on the first track.

Q. Whereabouts was your engine when the D. & H. passed you?

A. I should judge between six and seven hundred feet, something like that.

Q How long was your train?

A. We had eighteen cars.

Q. How long was each car?

A. They run different lengths, 33 and 36 feet; some may not run 33 feet.

Q. And part of them at least were high cars?

A. They are middling—all about the same height.

Q. About how high is that kind of cars?

A. I could not say just rightly

Q. Above the rail—10 or 12 feet?

A. I could not say just the height of them.

Q. How many years have you been on the railroad?

A. Twenty-two years and a half.

Q. Can you give some kind of an idea, from the top of the rail to the top of the cars?

A. I should judge about 12 or 13 feet, something like that

Q. How high are the passenger cars?

A. I suppose passenger cars are about that height—the centre of it, the sky-light might be a little bit higher.

Q. You were on the head end of the train. I draw the witness's attention to Picture No. 4—going in the direction of Pittston, as shown by the freight train on No. 4; and the train that did the damage was coming up the track the same as the engine is shown there—toward Scranton away from the crossing; whereabouts did your engine pass the engine of the D. & H. train that did the damage?

A. The D. & H. train, you mean?

Q. Yes?

A. I told you I passed just about 700 feet, something like that above the crossing.

Q. You mean toward Pittston?

A Towards Pittston, yes sir; He whistled right before he come to my engine.

JOHN SEARFOSS, Sworn for Defendant.

DIRECT EXAMINATION.

MR. WILL TORREY.

Q. Mr. Searfoss, you were the brakeman on this Jersey Central train?

A. Yes, sir.

Q. And you were in the cab at the time?

A. I was in the cab on the left hand side.

Q. Tell us what you know about this accident?

A. I don't know anything particular about it, only I saw a team standing there at the crossing when we passed.

Q. Where was it standing?

A. I didn't take any particular notice; I cannot remember rightly where they were standing.

Q. You couldn't tell with reference to the eastern track?

Q. I couldn't positively say.

Q. And you didn't see the accident itself?

A. I didn't see the accident.

Q. Was there a train standing or moving on the most easterly or fourth track of the D. & H. Company at that time?

MR. SHERWOOD.

All these questions are very leading.

THE COURT.

That is permissable in a matter of a contradiction like that.

A. No, sir.

MR. TORREY.

Q. Whether or not you noticed this passenger train of the D. & H. Company, coming towards you?

A. I noticed the passenger coming up.

Q. Did you notice whether it whistled or not?

A. Yes sir it whistled.

Q. Where did it whistle?

A. They whistle most generally about the usual whistling post.

Q. Where did it whistle at that time?

A. Well it is between seven and eight hundred feet from the crossing I should judge.

Q. Did you hear any other whistles after that?

A. The only whistle I heard was the road crossing whistle.

CROSS EXAMINATION.

MR. SHERWOOD:

Q. When did you last pass that crossing before the day of the accident.

THE COURT

What is the use of going into that?

MR. SHERWOOD.

I am going to test his recollection, on one thing.

THE COURT.

He didn t see any of the accident.

MR. SHERWOOD.

This is another branch.

Q. Did you pass there the day before?

A. Yes, I passed there the day before.

Q. Do you know whether there was a standing train on that track, the farthest east, the day before?

A. No, sir.

Q. You are sure of that?

A. Sure of it.

MR. TORREY.

Q. Was your attention called to the fact that this horse and wagon was struck at this crossing?

A. Yes sir.

Q. By whom?

A. Engineer Richards.

Q. Who is the man who just left the stand?

A. Yes.

Q. What did he say to you?

MR. SHERWOOD.

I object.

THE COURT

I don't see how he can tell that, except as he saw something following that.

Q. Did you see anything after that?

A. I didn't see anything after that.

JOSEPH BECKER, Sworn for Defendant.

DIRECT EXAMINATION.

MR. WILL TORREY.

Q. Mr. Becker, you are a fireman on the Central railroad of New Jersey train.—were you on that day?

A. Yes sir.

Q. What is your position?

A. On the tank—Fireman on the Jersey Central.

Q. What did you see of this accident?

A. I saw the rig standing on the other side of the track.

Q. Where, with reference to the eastermost track?

A. I cannot say how far it was.

THE COURT.

Q. Did you see the accident!

A. No sir I didn't.

Q. Did you hear a whistle?

A. Yes sir.

Q. Where?

A. Right below the first crossing,at the viaduct.

CROSS EXAMINATION

MR. SHERWOOD.

Q. Do you mean at the Dupont crossing?

A. Yes, crossing it.

Q. Down below the Dupont crossing?

A. Down below.

THE COURT.

Q. It was a regular crossing whistle, was it?

A. Yes sir.

MR. SHERWOOD.

Q. Where do you mean; on the Pittston side of the crossing?

A. No, on this side of the crossing.

Q. At the viaduct?

A. Yes sir.

WESLEY SAGOR, called and sworn for Defendant.

DIRECT EXAMINATION.

MR. WILL TORREY.

Q. Mr. Sagor, where do you live?

A. Mount Pocono.

Q. Where were you on the 30th of July 1907?

A. I don't know where I was on the 30th of July—I have no date when I was there.

Q. Did you see this accident in which Mrs. Flannelly's rig was struck?

A. Yes, sir

THE COURT.

Q. Tell what you saw of the accident?

A. I was standing on the crossing when the freight train went down.

MR. TORREY.

Q. On which track was that?

A. I was standing on the switch crossing.

Q. On which side, east or west?

A. That side (indicating.)

Q. Is that east or west?

A. I don't know which side it was.

Q. Down hill, or up?

A. I was standing on that side when the train was going down.

Q. Go on and tell your story—what did you see?

A. I saw the freight train going down.

Q. Then what happened? Did you see Mrs. Flannelly's wagon there?

A. Yes I saw the wagon.

Q. Where was it?

A. When I first saw it, it was standing there by the telegraph pole.

Q. And what did you do after the train went by?

A. I crossed, and I stopped the butcher wagon.

Q. Did you cross ahead of Mrs. Flannelly?

A. Yes, sir.

Q. You say you stopped a butcher wagon?

A. Yes, sir.

Q. That was on the other side of the crossing?

A. They were coming this way.

Q. They were coming from the west to the east Did you see this wagon of Mrs. Flannelly's struck by the engine?

A. When I crossed to stop the butcher wagon; when I turned around she was on the crossing, the wagon was right on the tracks.

Q. Which tracks?

A. The tracks where the train was coming up on.

Q. The passenger train?

A. Yes, sir.

Q. Did you see her before the passenger train hit the wagon?

A. Before I crossed I saw her.

Q. Did you see her again before she was struck by the train?

THE COURT.

Q. Did you see her struck? Did you see her struck by the engine—Did you see the wagon struck by the engine?

A. Yes, sir.

MR. TORREY.

Q. Were you looking at it at the time?

MR. SHERWOOD.

How could he see if he wasn't.

A. Yes, sir

MR. TORREY.

Q. Did you see how Mrs. Flannelly got out of the wagon?

A. Yes.

Q. How did she get out?

A. She jumped out.

Q. How did she land?

A. I don't know.

Q. Did she land on her feet?

A. I don't know.

CROSS EXAMINATION

MR. SHERWOOD.

Q. When the train pulled by the crossing—the freight train there, pulled by the crossing, going down toward Pittston, you went on and went across, didn't you?

A. When the train went over the crossing, I went across, yes.

Q. And you went over there and stopped, or met a butcher wagon on the other side?

A. Yes sir.

Q. That was some distance from the crossing—How far from the crossing?

A. It was right there by the crossing.

Q. How many feet from the rail—from the Lehigh Valley track?

A. I could not tell you, I didn't measure it.

Q. When you turned around, Mrs. Flannelly was on the second track, is that right?

A. On the one that the passenger was coming up.

Q. How far down was the passenger train at that moment?

A. It was about half way down the red row

Q. Did you hear any whistle?

A. No, sir.

Q. Did you hear any bell?

A. No, sir I don't remember.

Q. Were you there on the ground immediately after the accident?

A. Yes, sir.

Q. How long did you stay there?

A. Oh I don't know how long. (Mr. Mason requested to stand up)

Q. Did you see that fellow there, standing up, yonder?

A. No, sir I don't remember him.

Q. Did you see any lady step up and passed her a pocket book?

A. No sir.

Q. Did you see any lady come over and talk with him?

A. No, sir.

(The above witness was very deaf)

EDWARD O'DONNELL, Sworn for Defendant

DIRECT EXAMINATION.

MR. TORREY:

Q. What is your business Mr. O'Donnell?

A. Steam shovel foreman.

Q. Working for the Delaware & Hudson?

A. Yes.

Q. Where are you working?

A. Were repairing the shovel up in Carbondale.

Q. Do you know where the Smithville crossing is?

A. Yes, sir.

Q. How old are you, by the way?

A. 27 years old.

Q. Were you down at the Smithville crossing last week?

A. Yes sir.

Q. How long?

A. Two days.

Q. Between what hours?

A. Between a quarter after seven to 6 o'clock.

MR. TORREY.

We offer to show by the witness on the stand his actual count, showing the number of horses and wagons and foot travelers who crossed over that crossing during the two days that he waited there.

MR. SHERWOOD.

This is objected to for the reason that the number that crossed there last week is immaterial and irrelevant in this case.

MR. TORREY.

To be followed by other like testimony

with regard to other parts of the year, your honor.

THE COURT.

I will allow the evidence. Note an exception for the plaintiff.

MR. TORREY.

Q. What were you doing down there?

A. I was sent down there to keep the account of people and wagons, carriages, that passed over the crossing.

Q. What was the result of your count for those two days—Friday and Saturday.

A. Well, Friday the 20th, there were 46 wagons and carriages.

Q. Counting, going both ways?

A. Going both ways.

Q. How many foot travelers?

A. 108.

Q. How was it on Saturday?

A. There was—I have a list of them here—58 wagons and carriages on Saturday, and 126 people

CROSS EXAMINATION

MR. SHERWOOD.

Q. How were the hours?

A. About a quarter after seven to 6 o'clock.

THE COURT.

Q. From morning till night?

A. Yes sir.

JOHN QUISNAK, Sworn for Defendant.

DIRECT EXAMINATION.

MR. TORREY:

Q. What is your business?

A. I work for the railroad.

Q. Last September, were you watching at the Smithville crossing to count the teams, and people, that went over there?

A. Yes.

Q. How many days?

A. I was three days up there.

Q. What time in the morning did you go there?

A. I go in the morning 6 o'clock, and I quit night 6 o'clock.

Q. From 6 o'clock in the morning to 6 o'clock at night?

A. Yes sir.

Q. Did you report to anybody every night the number you counted?,

A. Yes, I report to boss.

Q. Who was that?

A. John McMahon.

Q. Did he put it down on paper?

A. Yes.

CROSS EXAMINATION.

MR SHERWOOD.

Q. How many did you find there the first day —how many carriages.

A. Oh, I don't know, I forget—it was long time.

Q. Was it over a hundred?

A. Yes.

Q. Count, for me, from 70 to 90—let us hear you count from 70 to 60?

A. I don't know what you mean.

MR. TORREY.

Q. How did you count them—what did you do with them?

A. I put down, you know—I put on paper and report to Boss every night.

Q. Do you mean you made a made a mark on the paper for every one that went over?

A. Yes.

MR. SHERWOOD.

Q. What did you use—a lead pencil?

A. Yes.

Q. Have a rubber on one end?

A. No.

FRANK CARBANK, sworn for defendant.

DIRECT EXAMINATION

MR. TORREY.

Q. You work for the D. & H.?

A. Yes.

Q. And were you down there with Quisnak at that crossing?

A. Yes.

Q. What time did you watch there?

A. Watch crossing—watch men many who cross—go across.

Q. What time did you go in the morning or night?

A. 6 o'clock.

Q. 6 o'clock at night?

A. Yes.

Q. How long did you stay there?

A. 6 o'clock next morning.

Q. Where did you mark the people who went by?

A. On paper, mark.

Q. Who did you report to?

A. Boss.

Q. When?

A. John McMahon.

Q. Every morning?

A. Yes, every morning.

CROSS EXAMINATION.

MR. SHERWOOD.

Q. There were two of you there?

A. Day and night.

Q. Two of you working there at the same time?

A. Yes.

Q. So many people crossing, it took two of you to mark it down?

A. Yes.

JOHN MCMAHON, Sworn for Defendant.

DIRECT EXAMINATION

MR. TORREY.

Q. Mr. McMahon, what do you do?

A. Section Foreman.

Q. Where is your section?

A. Well, from Moosic to Dupont—Smithville.

Q. Do you know where the Smithville crossing is?

A. Yes.

Q. Is that in your section?

A. Yes.

Q. Whether these last two witnesses, Quisnak and Carbank were in your gang?

A. Yes.

Q. Last September?

A. Yes, sir.

Q. You placed them at Smithville crossing, at any time, tell us how many days, and what for?

A. Well, I got orders to place them there for three nights and three days.

Q. To do what?

A. Count the traffic—wagons, automobiles—

Q. And how often did they report to you?

A. Morning and night.

Q. Both of them reported morning and night?

A. No, one.

Q. One in the morning and one at night?

A. The night man would report in the morning, and the day-man report at night.

Q. What sort of a report did they keep?

A. Well they had strokes down, every 10 strokes they crossed it over—every ten.

Q. And did you from their reports put down on this paper the results?

A. Yes sir.

Q. Is that in your hand writing?

A. Yes, sir.

MR. SHERWOOD.

We object to that.

THE COURT

He may read it.

MR. TORREY.

Q. What was the result—please read it?

A.

Sept. 2nd.	Day.	People	157:	wagons	23
	Night.	"	71	"	9
" 3rd	Day	"	89	"	34
	Night	"	62	"	3
" 4th	Day	"	98	"	29
	Night	"	58	"	5

CROSS EXAMINATION

MR. SHERWOOD.

Q. Where is the paper that the boys marked it down on Mr. McMahon?

A. Well their paper was destroyed—that was just a little piece of paper, and they would have it all dirt, and I copied it and sent it to the office.

Q. And it is from this copy, and not from what they made, that you have made this report that you testify to now here.

A. It is from what they gave me.

Q. It is from what you copied down for the original, as you now testified.

A. Yes.

Q. You are now testifying you read from that copy?

THE COURT.

He said so.

Now 5 p. m., court adjourned to 9:30 tomorrow morning.

Now 9:30 a. m., Thursday March, 26, 1908, court reconvened.

JOHN TAYLOR, Sworn for Defendant.

DIRECT EXAMINATION

MR. TORREY.

Q. Mr. Taylor, you are a stenographer?

A. I am.

Q. And you have acted as official stenographer for a good many years in this court, and in the common pleas court of this county?

A. Yes, sir.

Q. Were you employed by the Delaware and

Hudson Company to take notes of testimony before the coroner's jury.

A. Yes sir, on the 20th of August 1907.

Q. Who was the coroner?

A. Mr. John Hoberdorfer, Deputy coroner.

Q. Of what county?

A. Luzerne County.

Q. Where was the inquest held?

A. Held in the Town hall, West Pittston, Pa.

Q. Upon whose death was the inquest held?

A. The death of Howard Toohill.

Q. Have you your notes of testimony in this case, taken stenographically, or have you not.

A. Yes, sir.

Q. Did that relate to the same accident which is in question here.

A. Yes, sir.

Q. Was Harry Gilfeather sworn as a witness before the coroner.

A. He was.

Q. Will you tell us whether he was asked the following question, and gave the following answer:

"Q. Do you know?"

"A. I could not say positively, but I am pretty sure; I think the wagon stopped a bit there, waiting for the train to go by, and as soon as the freight train got over, this woman started to drive the horse, and she gave a holler, and the boy and her jumped."

A. I have that here, yes sir.

Q. Again, further on, was he asked this question, and did he give this answer?—

"Q. Until the freight had passed, they were not on any tracks at all?"

"A. No, not as I know of."

A. Yes sir, I have that.

Q. Was Ray Wallace also sworn as a witness there?

A. Yes, sir. I think his name given in this trial is Roy Wallace.

Q. Was he asked this question, and did he give the following answer:

"Q. They were not on any track?"

"A. They were not on any track when I seen them; they stood right close to it; we were at John Hexter's place, and that is a kind of hotel there on the main road, at the corner; and just as the freight train started out, she drove across, but I could not tell which was driving, the boy or the woman, or who, because their backs were turned to us; and I heard the whistle, and I spoke something to the boy. I said something about there must be a train coming; of course it was quite a ways down the track when the whistle blew; so just as she was driving then, we seen the passenger coming, and I says "Look out there" to the boy. After it struck, we went down. The wagon lay over to one side of the track all broke up, one wheel off, and turned upside down, and the boy laid there on the middle of the track, and we said something to each other about picking him up, and by that time one of the car men came and put him in the car, and they took him to Avoca."

A. That is right.

Q. Was he asked this question, and did he give an answer as follows:

"Q. Was there any train upon the track nearest to you?

"A. No, sir, there was not; that was clear: and just as it happened I kinder said to the boy 'no wonder they got killed, you cannot see a passenger

coming up here when a freight train is going down—you cannot see it."

Q. Did he so answer?

A. He so answered, except that he said "You cannot see a passenger coming up *here*, instead of *there*,

Q. Was he asked this question, and did he so answer:

> " Q. You did not see the boy try to jump from the wagan, or whether he got knocked from the wagon?
>
> " A. From what I seen, the woman and the boy; we heard her holler awful plain, and it was a clear day, and I heard her say something like 'jump,' and she gave an awful scream, and she and one boy jumped, and the other boy was standing up in the wagon as if he was going to jump, just as the engine came. I could not say whether he jumped or not."

Is that correct?

A. Yes, sir.

Q. Again, the Question was asked: " Q. Well, a person standing here with the horse's feet on that track, would have a clear view up that track of more than 60 or 70 feet, wouldn't he?"

> " A. Yes, sir."
>
> " Q. And it must have been clearly in their view at that time?"
>
> " A. It must have been in their view at the time they started across the track."

A. Correct.

WALTER M. MANCHESTER, recalled by defendant.

RE-DIRECT EXAMINATION.

MR. TORREY.

Q. You are the photographer who was sworn yesterday?

A. Yes sir.

Q. Did you go down to the house described as the house of Mr. Aherns yesterday?

A. I don't think I heard the name, but I made a picture from the house.

Q. There were two houses standing together, and it was over on the hill, on the opposite side?

A. Yes, sir.

Q. Which one of the two was this?

A. It was the one on the south, I think.

Q. The one south?

A. Yes, the one south.

Q. The one pointed out to the jury the other day as the Ahern house. Did you take a picture from that house?

A. I did.

Q. Looking over toward this crossing?

A. Yes sir.

Q. This is the photograph, is it?

MR. SHERWOOD:

We have no objection.

MR. TORREY.

I offer it in evidence. (Marked "Defendant's Exhibit No. 9.")

A. F. DERSHIMER, recalled by defendant.

RE-DIRECT EXAMINATION.

MR. TORREY:

Q. Mr. Dershimer, you were called yesterday, as the civil engineer of the company?

A. Yes, sir.

Q. You were upon the scene of the accident yesterday?

A. Yes.

Q. Did you measure to the fifth red house in that row, from the center of the crossing?

A. Yes sir.

Q. What was the distance?

A. 745 feet.

Q. And you placed it upon the map here, in pencil, did you?

A. Yes sir.

Q. Did you measure also across from the crossing to the Ahern house?

A. You mean the one we took the picture from?

Q. Yes?

A. Yes, sir.

Q. What was that distance?

A. 640 feet.

THE COURT

Which red house is that?

MR. TORREY.

That is where the sewing machine agent said he was, your honor.

CROSS EXAMINATION.

MR. SHERWOOD.

Q. That 5th house is on the higher point of ground of any of the houses in that row, is it not?

A. I think it is about the same elevation as the one below that—the other side of it. but a little higher than the ones on this side of it,

Q. Isn't it the highest of any in that row?

A. I could not say as to that,

Q. Well it is quite a little higher than the ones this way?

A. I think it is a little higher—I could not say how much.

Q. Mr. Manchester, where did you stand to take this photograph—where was the camera?

A. On the porch of the house.

MRS. STANLEY DRAKUS, Sworn for Defendant.

DIRECT EXAMINATION.

MR. TORREY

Q Mrs. Drakus, you live right opposite this Smithville crossing, do you?

A. Yes, sir.

Q. I show you Defendants Exhibit No .5, being Photograph No. 6, is that the further part of the first house that you live in? (witness indicates to court)

Q. It is the further half of the first house? (points to the second right half)

Q Well—it is right opposite the crossing. There is the first. There is first a white house, and then three red houses together?

A. Yes, sir.

Q. Which of the red houses do you live in?

A The first red house.

Q. The white house is a good deal larger than the red house?

A. Yes, sir

Q. And has a porch on it?

A. Yes, sir.

Q. Show us in this picture (Exhibit No. 9) the white house (Witness indicates) With the porch on it—that is the white house?

A. Yes sir.

Q. Where were you at the time of the accident Mrs. Drakus?

A. I was behind my house.

Q. Toward the railroad, or away from it?

A. Away from it.

Q. You were back of the house?

A. On the back of my house.

Q. Then you didn't see the accident?

A. No

Q. Did you go out, after the accident?

A. Yes sir,

Q. Did you see Mrs. Flannelly?

A. Yes sir.

Q. Where was she—what was she doing?

A. She was standing there, and crying.

Q. Whether she appeared to be injured in any way?

MR. SHERWOOD.

I object.

MR. TORREY.

Q. What was her appearance, as to her being hurt in any way?

THE COURT

Q. Was she hurt?

A. No.

MR. TORREY.

Q. Whether there were any cars upon the furthest D. & H. track what is called the slow track?

A. No, I didn't see it.

CROSS EXAMINATION.

MR. SHERWOOD.

Q. When you came out to the front there of your gate—

A. Yes.

Q. You came right out there, as the accident happened?

A. Yes, sir.

Q. And whom were talking with there Mrs. Drakus?

A. I was talking to Mrs. Zamber.

Q. And Mrs. Zamber was over to your house?

A. No—when I got out there, you know.

Q. Do you there, by your house, remember seeing Mr. Whites?

A. No.

Q. Did you see him there at your house, at all?

A. No, I don't.

Q. Was he there talking with some one by the wagon, if you remember?

A. No, sir I don't remember.

Q. You didn't hear any whistle?

A. No, I could not say.

Q. You didn't hear any bell, and of course at the time of the accident there was a big excitement there wasn't there?

A. There was.

Q. And you didn't notice any other train at all, did you? Only the passenger train that hit her?

A. And the freight coming up first, I seen it—it was going up, to Wilkes-Barre.

Q. That was before the accident though?

A. Yes.

Q. Before you went up behind the house?

A. Yes sir.

Q. How long were you up there behind the house?

A. I could not tell, it wasn't long, because I got out as soon as I—

Q. Two or three minutes, four, or five minutes?

A. About three minutes.

Q. And you saw the freight coming up before you went up behind your house?

A. Yes sir.

Q. What other parties were you talking with down in front there, besides Mary Zamber?

A. Oh, I don't know—there was lots of people there, we were talking together; I don't know who t was.

Q. You saw a lot of passengers there that got out of the train, didn't you notice?

MR. TORREY

We object to this as not a cross examination.

MR. SHERWOOD.

Q. You said Mrs. Flannelly was crying; did you hear her scream?

A. Yes, sir.

Q. Did you see her throwing her arms?

A. Yes, sir, I did,

Q. And tearing her hair?

A. No, I didn't.

Q. Did you see her on the ground?

A. No.

Q. She was dancing about?

A. Yes, she was.

Q. Acting like a person nearly crazy?

A. Yes, she was.

Q. Had the freight train which you saw before you went back of your house, gone entirely by before you went up there?

A. Yes, sir.

MARY ZAMBER, sworn for Defendant.

DIRECT EXAMINATION.

(through medium of interpreter, Miller.)

MR. TORREY.

Q. You are a married lady?

A. Yes sir.

Q. What is your husband's name?

A. Andrew Zamber.

Q. Where do you live?

A. Dupont—Smithville.

Q. That is right in the house opposite the Smithville crossing?

A. Yes sir.

Q. Where were you at the time that this accident took place?

A. I was going after the water in the front of my house.

Q. Did you see a man taking photographs down there some weeks ago—or some time ago?

A. Yes sir, I did.

Q. Did you place yourself then, while he was taking the photograph, where you were standing at the time of the accident?

A. Yes, sir.

Q. Is that your picture, standing by the pile of ties, in Exhibit No. 5 (Photograph No. 6).

A. Yes, sir, that is my picture. (Photograph handed to court).

Q. Did you see Mrs. Flannelly—this lady, that day?

A. That day, when the picture was taken?

Q. No, the day of the accident?

A. Yes, sir, I did.

Q. When, and where, did you first see her?

A. When I was going after the water with my pails—this lady, whatever her name, she was going to the crossing—and the freight passed, that time, and as soon as I seen the engine-smoke, I dropped my pails and I hauled myself back, as soon as I seen the smoke of the engine.

Q. What track was the freight train on?

A. That was on the track very near to me.

Q. The first track next to you?

A. The second track, little track, Lehigh Valley, by that.

Q. It was the first track of the Lehigh Valley?

A. Yes, sir.

Q. And the freight was going towards Wilkes-Barre?

A. Yes, sir.

Q. The next track beyond that is the track on which the passenger train came?

A. Yes, sir.

Q. And there is another track beyond that, over the other side?

A. Yes, sir

Q. Were there any cars on that other track, or train?

A. I didn't see any.

Q. Where was the freight train, or had the freight train gone altogether over the crossing when you first saw this woman with the wagon?

A. I see only the freight start to pass the crossing, and the lady going that time.

Q. Can you describe just how soon after the freight cleared the crossing—where was the lady's horse when the last car of the freight train got by?

A. Very near to the car.

Q. Was she on any of the tracks, and if so, which one?

A. As soon as the freight struck the horse, and she jumped out of the buggy, and the boy got killed that time—as soon as the freight car struck.

THE COURT

The freight car didn't strike.

MR. TORREY.

It is not an answer to my question at all; I ask to have the answer stricken out as not responsive to my question at all. I didn't ask anything about what struck her, or anything else.

THE COURT.

It is so clearly a mistake that I will strike out the answer.

MR. TORREY.

Q. Was she on any of the tracks, and if so, which one, when the last car of the freight train went by the crossing?

A. Then the freight passed by it, and about few cars yet wasn't there, so she was on the first track, and that time she been struck, the first track from where the freight train was, on the second track that is—

Q. What struck her?

A. The horse was across the track, and the train struck the wagon.

Q. What did the woman do, when the train was coming toward her, if anything?

A. She started to holler, and crying.

Q. How did she get out of the wagon?

A. She got up and jumped out.

Q. How did she land; on her feet or otherwise?

A. She fell on her hands down.

Q. What struck the ground first, her feet or her hands?

Q. I could not tell exactly, only I saw when she fell that way.

Q. Who else, if anybody, jumped out of the wagon?

A. One of her boys jumped after; she jumped first, her boy jumped after, and the third boy, that is the second boy, left in the wagon.

Q. What did she do after she jumped out of the wagon?

A. Well, she looked at the boy, and the boy was killed, and she started to holler. The boy was killed very quick.

Q. Did she walk over to where the boy was?

A. I didn't see that.

Q. Did she get right on her feet, or did she remain lying on the ground?

A. I didn't take notice. I pay more attention to the boy; I didn't take the notice if somebody raised her there or she got up herself.

Q. Did you see any bruises, or wounds on her?

A. She was very excited—I didn't see no bruises or any marks she was very excited.

CROSS EXAMINATION

MR. SHERWOOD.

Q. Mary, you were standing in front of your

yard gate when the accident happened as I understand it?

A. Yes sir.

Q. Had you been and got the water, or just on your way, going?

A. I was going after the water.

Q. And when you came out there, did you see Mary Drakus?

A. No, I didn't see—I saw her after the boy was killed.

Q. The freight train was just passing the crossing?

A. When?

Q. When you stood out in front of your own yard gate?

A. Yes sir the freight was passing.

Q. And how much of the freight train had passed, when the accident happened—how many cars?

A. I couldn't tell you how many cars was passing

Q. It hadn't all passed yet?

A. Pretty nearly all of them was past.

Q. Four or five cars on the freight train hadn't yet crossed the crossing?

A. They all was past.

Q. Now, you didn't hear any whistle blown?

A. I cannot tell exactly, might, and might not —only I see the smoke.

Q And when you saw the smoke you dropped your water pail?

A. When I see the smoke I dropped my pails, because I see she was very near to it.

Q. She was already on the track, that is, her horse was on the second track?

A. Yes sir, was right on it.

Q. Was the horse stopped?

A. Yes sir.

Q. The horse was stopped?

A. The horse was stopped that time when he was across to the track, and the wagon was on the track, and she jumped out that time.

Q. Did you see them hit the horse with the whip?

A. I couldn't tell, I didn't see that.

Q How far from the crossing was the hind end of the passing freight when you saw the woman jump from the wagon?

A. They was only past the crossing.

Q. Just a little bit past? (Interpreter—that is what she says)

Q. Was it as far as two cars or three cars?

A. From here to Mr. Torrey.

MR. TORREY.

About 15 or 20 feet.

MR. SHERWOOD.

Q That train was a train of high freight cars, was it not?

A. Yes sir.

Q. You live in the company-house, there—in that row of houses do you not?

A. I live in the house, only the house doesn't belong to the company.

Q. Does your husband work for the company?

A. What company?

Q. What company does your husband work for?

A. The Lehigh Valley.

MR. TORREY.

I believe that is our case, your honor, with the exception of Joseph Gans.

THE COURT.

I have sent out for him I will allow you to take his testimony when he comes in.

REBUTTAL TESTIMONY.

MRS. MARY E. FLANNELLY, Recalled.

MR. SHERWOOD.

Q. Mrs. Flannelly. it was testified yesterday by one of the witnesses, that while you were there on the tracks, you got up and came over and asked him about a pocket book?

A. I don't remember anything of the kind.

Q. Did you go over to the witness, or to any one, or in the presence of any one, and say "Here little boy, why don't you holler—holler now" or something to that effect?

A. No, sir, I was too glad to see him, if I saw him; I didn't do it; I couldn't do it.

CROSS EXAMINATION

MR. TORREY.

Q. I understood you to say when you were on the stand before, you could not remember anything that occurred there until you got over to Mrs. Aherns house—isn't that so?

A. Yes, sir.

Q. Then you cannot say whether you said that or not, can you?

A. I said I don't remember saying anything of the kind.

Q. Well, you don't remember anything that occurred at that time, do you?

A. No, sir.

DR. A. D. THOMAS, called and sworn for Plaintiff.

DIRECT EXAMINATION.

MR. TORREY.

Make an offer, please?

MR. SHERWOOD.

I will ask a few preliminary questions first:

Q. Doctor, you are a practicing physician in Luzerne County?

A. Yes, sir.

Q. Where are you located?

A. Forty Fort.

Q. For how many years have you been practicing?

A. About twenty-six.

Q. Whether or not during that time you have had occasion—

MR. TORREY.

I would like an offer now.

MR. SHERWOOD.

Purpose to show by the witness on the stand that he is familiar with the disease known as torticollis or wry-neck, and that one of the causes of such disease is traumatism, or wound; that the disease does not come on immediately or all at one time, but is a progressive one. That in the course of the development of the disease, the shoulder

will be elevated; that it is accompanied by more or less curvature of the spine. This contradiction of the evidence of Dr. Burns who said that it never developed from traumatism or wound; and also in contradiction of the evidence given by the defendant's witness, Dr. Weisenburg. This to be followed by further evidence, of the same witness, that he is suffering with the same disease, caused by a traumatism, and has given the matter great study in an effort to be relieved from his own embarassment and suffering.

In connection with the first offer; that the head is not always held rigid, but can be moved.

MR. TORREY:

This is objected to as not rebuttal, but a part of the plaintiff's case in chief, into which they went to a considerable extent.

THE COURT.

It seems to me that this is evidence. I will allow the testimony. Note an exception for the defendant.

MR. SHERWOOD.

Q. Doctor, for how many years have you been practicing?

A. Twenty-six years.

Q. What trouble are you suffering with, with that condition of your neck?

A. Well, it is a wry-neck—that is what we call it.

Q. Torticollis?

A. Yes.

Q. For how many years have you had that trouble?

A. About forty-three years.

Q. What was the cause, if you know?

MR. TORREY.

Q. May I ask you how old you are, doctor?

A. 50 years old.

MR. SHERWOOD.

Q. Do you know the cause of it?

A. Well, it followed a fall down stairs when I was a boy—it developed slowly after the fall.

Q. For how many years was it in developing, before it reached the present stage?

MR. TORREY.

I object to the question, your honor I don't think we ought to go into this particular case; and in that connection, I move to strike out the previous question and answer with reference to the cause of his particular complaint.

THE COURT.

It seems to me that that is admissible.

MR. SHERWOOD.

Q. Doctor, whether or not, in an effort to relieve yourself from your condition you have given attention and study to this disease?

A. I have.

Q. What are some of the causes of this disease?

MR. TORREY.

I object to the question.

MR. SHERWOOD.

Q. Whether or not traumatism or wounds, in your opinion, is one of the prime causes of this disease?

A. It is a cause; quite a common cause, yes,—injuries, rather than wounds.

Q. Now, whether or not, accompanying that disease, there is commonly an elevation of the shoulder?

A. That will develop very soon after the contraction of the cords—throws the shoulder out, but the opposite shoulder will always be raised.

Q. What about the condition of the spine, as to curvature?

A. The shoulder on which, the same side the contraction occurs, will always be raised.

Q. What about the condition of the spine, what will be the shape of the spine?

A. There will be some curvature of the spine.

CROSS EXAMINATION.

MR. TORREY.

Q. The curvature of the spine is compensatory, is it not?

A. Yes sir.

Q. It is not a part of the disease at all, it is simply an adjustment of the spine to the position of the head?

A. Yes.

Q. And not necessarily bent over at all?

A. Not necessarily no sir.

Q. Now your case is a case of spasmodic torticollis, is it not?

A. Yes sir.

Q. That is quite different from a fixed torticollis?

A. Yes, there is some difference, yes sir.

Q. In the case of a fixed torticollis, the head is rigid, and cannot be moved, isn't it?

A. Where it is fixed there is not much motion allowed in fixed torticollis; it depends on the adhesions, and to what degree it is fixed; it may be fixed to any degree, it depends largely on the adhesions and the contractions of the muscles involved.

Q. There is a very wide distinction, and very easily observed, between the spasmodic and fixed torticollis, isn't there?

A. Yes sir, it isn't very hard to distinguish them.

Q. Do you know what part of your body was injured at the time of your fall?

A. My collar bone, among other things; I don't know to what extent the injury was—I was very small.

Q. And the injury was about the neck?

A. About the neck, sure.

Q. You never know of torticollis on the left side, resulting from a bruise upon the left side, of the head, did you?

A. Well, any bruise or injury to the muscles, sufficient to produce an inflammation of the muscles will produce torticollis.

Q. Isn't it true that the injuries to the left side of the head, on the skull, affect the muscles upon the right side of the body?

A. Where the injury is at the beds or the roots of the nerves, it is so, yes, in the head, but an injury to any part of the trunk, a nerve before its final distribution to the muscle upon which it acts will affect that muscle pretty nearly the same as if it was in the seat of the nerve; for instance the nerve is severed between its origin and distribution, there will be a paralysis of the muscle to which it is distributed; likewise, if there is any irritation along

the track of that nerve, from adhesions, the result of inflammation, there might be contractions of that muscle, or a disturbed function of the muscle and the seat of the injury may not be in the brain or at the insertion of the nerve.

THE COURT.

Q. On which side is your neck affected?

A. On the right side.

A. On which side was your collar bone fractured?

A. My collar bone was fractured almost on the left side, very close to the sternum.

Q. That is to say, your neck is affected on the right side?

A. Yes, sir.

Q. And the injury to your collar bone was on the left side?

A. Yes sir. Of course, I don't know that that was the whole of the injury.

MR. TORREY.

Q. Doctor, did you ever make an examination of Mrs Flannelly?

A. No, sir. I don't know anything about this case.

Q. You could not tell us whether she has true torticollis or not?

A. I never examined her.

MR. SHERWOOD.

Q Doctor, where is the upper end of the muscle that controls the neck, controls it toward the left side?

A. It rises out of the Mastois process of the temple bone, right behind the ear; comes down here (indicating) and inserted by two heads, one in the upper end of the breast bone, and another head just

on the collar bone, just beyond the breast bone—comes down like that. Mine is contracted now (indicating)

Q. Would an injury to a muscle up there, behind the ear cause it to become weakened and permit the neck to twist?

MR. TORREY.

I object to the question as very leading.

THE COURT.

I sustain the objection.

THE COURT

Q. Do you think you could tell whether Mrs. Flannelly has wry-neck or not, if you examined her?

A. I could form an opinion, of course.

MR. SHERWOOD.

If your honor please, we would like to have that examination made.

MR. TORREY.

We shall not object; we have entire confidence in the doctor's impartiality in this case.

(The Plaintiff conducted into an adjoining room, for the purpose of examination by Dr. Thomas—Jury also present.)

THE COURT.

Q. Doctor, please give us the result of your examination?

A. I find there is torticollis there, involving the sterno cleido mastoid, and some of the posterior muscles of the neck.

MR. TORREY.

Q. You could not, of course, give the origin of it?

A. Not unless I went into the history of the case. I just formed my judgment from the physical conditions there.

Q. Physical conditions altogether?

A. Yes, sir.

Q. Now if there were torticollis resulting from traumatism, how soon would it exhibit itself so as to be noticeable?

A. It would begin to be noticeable—

Q. To a physician?

A. It would begin to be noticeable as soon as the inflammation developed.

Q. How long would that take?

A. 24 to 36 hours.

Q. 24 to 36 hours?

A. Possibly, yes.

Q. Does torticollis ever, in your opinion, result from hysteria?

A. Yes sir.

Q. Is that a common cause of it?

A. Occasioned by fright or intense mental agitation. It is a common cause in nervous people—nervous women especially.

THE COURT.

Q. Would that be temporary or permanent, if it were the result of hysteria?

A. It would be temporary; it would not be permanent.

Q. As soon as that which caused the hysteria was removed, the torticollis would disappear?

A. Yes, sir.

MR. TORREY.

Q. That is, as soon as the nervous system was restored to its normal condition?

A. As soon as the cause is removed, yes.

Q. As long as the nervous condition continued, the torticollis would continue?

A. It might continue spasmodically then, during the aggrevations of those conditions.

Q. I say, it would continue as long as the nervous condition, but no longer?

A. Yes, sir.

MR. SHERWOOD.

Q. The sternum mastoid is the name of the nerve which leads—

A. No, that is the name of the muscle, that runs down here (indicating).

Q. Doctor, would it develop, after an injury, or be likely, so that an individual could observe it in four or five days after the injury?

MR. TORREY.

He said 24 to 36 hours. I object to the question as leading, and for the reason that the witness has answered that point.

THE COURT.

I think we have been over that point.

PLAINTIFF RESTS.

JOSEPH GANS, Sworn for Defendant.

DIRECT EXAMINATION

MR. TORREY.

Q. Mr. Gans, what is your occupation?

A. I am a butcher.

Q. Where do you work?

A. In Scranton.

Q. What kind of business?

A. Butcher.

Q. For whom were you working on July 30th, at the time of this accident—1907?

A. I was to work for myself.

Q. Were you in partnership at that time?

A. Yes, sir.

Q. Who with?

A. Joe. Dresler.

Q. Where were you at the time this accident happened?

A. I was on the other side, by the tracks, you know—on the other side.

Q. On the westerly side?

A. Yes sir.

Q. That is, opposite from where Mrs. Flannelly was?

A. Yes.

Q. What were you doing there?

A. I was going with the butcher wagon; I was peddling meat in the butcher wagon, and I was coming on that road, and I started to come, and after I stop.

Q. What did you stop there for?

A. Because I heard a train blow, you know—was pretty near, and I stop the horse right away, you know.

Q. Was there a train coming on the track at all?

A. Yes sir it was very near; very near the road I was on.

Q. What trains were there moving there; was there a train on the nearest track to you?

A. Yes it was near to me.

Q. Which way was that train going?

A. To Wilkes-Barre, I guess,—no to Scranton.

THE COURT.

Q. What train was going to Scranton?

A. That train that killed that boy.

MR. TORREY.

A. There was two trains: I don't remember if was an engine to that, you know, but any number cars on the first tracks standing there.

Q. That is, near you?

A. On the first track was cars and on the second track was a freight going—I don t remember whether to Wilkes-Barre or Scranton, and the third track, I started to go right down, and after I heard the train whistle I stop the horse right away.

Q. Did you see Mrs. Flannelly on the other side of the tracks?

A. Yes sir, I did.

Q. Where was she standing?

A. I didn't see her standing; I see her run, you know—I was waiting till the car go through—till the train go through you know, and I was looking and see the other buggy; and I started to go too with my horse, and when I saw her was the horse on that track from the D. & H.,—where the D. & H. killed the boy— and the buggy was on the other tracks you know; and I started to go too, and after when I heard the whistle, train blowing, I stop the horse right away.

Q. Did you see this train hit the wagon Mrs. Flannelly was in?

A. Yes sir I did.

Q. What did Mrs. Flannelly do?

A. She jumped out of the buggy and the other boy jumped out of the buggy too.

Q. How did she land?

A. I cannot tell you, because the train come, and I could not tell if she fell down or she didn't.

Q. Why couldn't you see?

A. Because the train came in, and broke the buggy, and I couldn't see any more.

Q. That shut out your view, so that you couldn't see any more?

A. Yes, sir, because I wasn't on the other side.

Q. Did you see her after the train went by?

A. Yes.

Q. Was she hurt?

A. No.

Q. What was her condition?

A. She was crying; she was standing crying and break the hands, and crying all the time.

MR. SHERWOOD.

No cross examination.

The above and foregoing is hereby certified as all the evidence taken upon the trial of this case and is thereupon directed to be filed so as to become a part of the record; on which judgment non obstante veredicto is moved in favor of the defendant.

R. W. ARCHBALD,
District Judge.

IN THE

CIRCUIT COURT OF THE UNITED STATES

For the Middle District of Pennsylvania.

JOHN FLANNELLY and MARY FLANNELLY	
vs.	No. 124 January Term, 1908
DELAWARE AND HUDSON COMPANY.	

Now, the 4th day of January, 1909, comes the defendant by its attorneys and preseuts to the court its petition praying for the allowance of a writ of error and assignments of error intended to be urged by it, and praying also that a transcript of the record, papers and proceedings upon which judgment was rendered duly authenticated be sent to the Circuit Court of Appeals for the Third Circuit and that such other and further proceedings may be had as is proper in the premises.

In consideration whereof, the Court allows the writ of error upon the defendant giving bond according to law in the sum of Five thousand (5,000) dollars which shall act as a supersedeas.

R. W. ARCHBALD,
District Judge.

IN THE
CIRCUIT COURT OF THE UNITED STATES
For the Middle District of Pennsylvania.

JOHN FLANNELLY and MARY FLANNELLY vs. THE DELAWARE AND HUDSON COMPANY.	No. 124 Jan'y Term, 1908.

KNOW ALL MEN BY THESE PRESENTS, that THE DELAWARE AND HUDSON COMPANY, as principal, and THE TITLE GUARANTY & SURETY COMPANY, as surety, are held and firmly bound unto John Flannelly and Mary Flannelly, the defendants in error, in the full sum of Five thousand, to be paid to said defendants in error, John Flannelly and Mary Flannelly, their certain attorneys, executors or assigns, to which payment well and truly to be made we bind ourselves and our successors, jointly and severally, firmly by these presents.

SEALED with our seals and dated the 4th day of January, 1909.

WHEREAS, Lately at a Circuit Court of the United States, for the Middle District of Pennsylvania, in a suit pending in said Court between John Flannelly and Mary Flannelly and The Delaware & Hudson Company, a judgment was rendered against the said The Delaware & Hudson Company, defendant, and the said, The Delaware & Hudson Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment on the aforesaid suit, and a citation

directed to the said John Flannelly and Mary Flannelly citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Third Circuit to be holden in Philadelphia in the said Circuit.

NOW THE CONDITION OF THIS OBLIGATION IS SUCH, That if the said, The Delaware & Hudson Company, shall prosecute the said writ of error to effect and answer all damages and costs if it fail to make said plea good, then the above obligation to be void, or else to be and remain in full force and virtue.

THE DELAWARE & HUDSON COMPANY
By W. H. WILLIAMS,
Third Vice-President.

THE TITLE GUARANTY & SURETY CO.
By B. P. KEATING,
Vice President.
O. K. W. G. D., O. K. J.

SEAL

Attest:
C. A. WALKER.

SEAL

Attest:
FRED'K W. TRACY,
Assistant Secretary.

Approved:
R. W. ARCHBALD,
District Judge.

IN THE
CIRCUIT COURT OF THE UNITED STATES,
Eor the Middle District of Pennsylvania.

JOHN FLANNELLY and MARY FLANNELY, vs. THE DELAWARE & HUDSON COMPANY. } No. 124 Jan. Term, 1908.

CITATION.

UNITED STATES OF AMERICA: SS.
THE PRESIDENT OF THE UNITED STATES.

To John Flannelly and Mary Flannelly, and Paul J. Sherwood, their attorney, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the third Circuit to be held at the City of Philadelphia, in the State of Pennsylvania, on the 3d day of February in the year of our Lord one thousand nine hundred and nine, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Middle District of Pennsylvania, wherein The Delaware & Hudson Company is plaintiff in error and John Flannelly and Mary Flannelly are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Melville W. Fuller, Chief Justice of the United States of America, this 4th day of January, 1909, and of the Independence

of the United States the one hundred and thirty-second.

E. R. W. SEARLE,
Clerk of United Circuit District Court
for the Middle District of Pennsylvania.

Allowed by

R. W. ARCHBALD,
District Judge.

Now, January 7, 1909, service of the within citation is hereby accepted and the Clerk of the District Court is directed to enter my appearance for the defendant in error in the above entitled case.

PAUL J. SHERWOOD,
Attorney for Deft. in Error.

JOHN FLANNELLY and MARY FLANNELLY vs. DELAWARE & HUDSON CO.	No. 124 Jan. Term, 1908.

UNITED STATES OF AMERICA: SS.

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judges of the United States Circuit Court for the Middle District of Pennsylvania: Greeting:

Because in the record and proceeding as also in the rendition of a judgment of a plea which is in the said Circuit Court before you between John Flannelly and Mary Flannelly, plaintings and The Delaware & Hudson Company, defendant, a manifest error hath happened to the great damage of the said defendant, The Delaware & Hudson Company, as by

IN THE
CIRCUIT COURT OF THE UNITED STATES
for the Middle District of Pennsylvania.

JOHN FLANNELLY and MARY FLANNELLY vs. THE DELAWARE AND HUDSON COMPANY,	No. 124 Jan'y Term, 1908.

Now, January 6, 1909, the Clerk of the Court is directed in making up the record of the appeal in the above entitled case for transmission to the United States Circuit Court of Appeals for the Third Circuit, to eliminate from said record all papers filed which have reference to the attachment proceedings against Joseph Gans and Edward Weiss; also all papers filed which have reference to the rule for a new trial on the ground of after discovered evidence, the affidavits of the witnesses, depositions and testimony of the same and opinion of the Court discharging the rule, it appearing that the defendant has not appealed from the order of Court discharging the rule for a new trial but only from the order of Court discharging the rule for judgment non obstante veredicto.

R. W. ARCHBALD,
District Judge.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF PENNSYLVANIA. } SCT.

I, EDWARD R. W. SEARLE, Clerk of the Circuit Court of the United States of America, for the Middle District of Pennsylvania in the Third Circuit, DO HEREBY CERTIFY that the writings annexed to this certificate are true copies of their respective originals as per praecipe filed, on file and now remaining among the records of the said Court in my Office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed
(SEAL) the seal of the said Court, at Scranton, this 6th day of January, in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States the 133rd.

E. R. W. SEARLE,
Clerk of C. C.

In the United States Circuit Court of Appeals, Third Circuit, March Term, 1909.

No. —.

THE DELAWARE AND HUDSON COMPANY, Plaintiff in Error,
vs.
JOHN FLANNELLY and MARY FLANNELLY, Defendants in Error.

Writ of Error to the Circuit Court for the Middle District of Pennsylvania.

Record.

Welles and Torrey, Scranton, Pa., for Plaintiff in Error.
Paul J. Sherwood, Wilkes-Barre, Pa., for Defendants in Error.

In the Circuit Court of the United States for the Middle District of Pennsylvania, January Term, 1908.

No. 124.

JOHN FLANNELLY and MARY FLANNELLY
vs.
THE DELAWARE & HUDSON COMPANY.

Welles and Torrey except to the Order of the Court discharging the Rule for judgment for the defendant non obstante veredicto.

(Signed) WELLES & TORREY,
Attorneys for Defendant.

Now, to wit, January 26, 1909, the above exception is allowed, and bill sealed nunc pro tunc as of September 30th, 1908.

R. W. ARCHBALD, [SEAL.]
District Judge.

The foregoing paper contains the following endorsement:
No. 124. Jan. Term, 1908. C. C. U. S. M. D. Pa. John Flannelly and Mary Flannelly vs. The Delaware and Hudson Company, Exception. Filed Jan. 26, 1909. E. R. W. Searle, Clerk. Welles and Torrey, Attorneys and Counselors at Law. Nos. 320 to 324 Connell Building, Scranton, Pa.

Filed April 15, 1909.

In the Circuit Court of the United States for the Middle District of Pennsylvania, January Term, 1908.

No. 124.

JOHN FLANNELLY and MARY FLANNELLY
vs.
THE DELAWARE AND HUDSON COMPANY.

Now, January 2, 1909, the jury having heretofore, to wit, on March 26th, 1908, rendered a verdict in favor of the plaintiff, Mary Flannelly, in the sum of Two Thousand Dollars ($2,000), and in favor of the plaintiff, John Flannelly, in the sum of Five Hundred Dollars ($500), and the rule to show cause why judgment should not be entered for the defendant non obstante veredicto on the whole record having been discharged,

Therefore, judgment is entered on the verdict in favor of the plaintiff, Mary Flannelly, in the sum of Two Thousand and Eighty-two and Forty-four one-hundredths Dollars ($2,082.44), with costs, and in favor of the plaintiff, John Flannelly, in the sum of Five Hundred and Twenty-three and Eleven one-hundredths Dollars ($523.11), with costs.

R. W. ARCHBALD,
United States District Judge.

Let the above be entered and filed nunc pro tunc as of January 2, 1909.

R. W. ARCHBALD,
District Judge.

April 8, 1909.

UNITED STATES OF AMERICA,
Middle District of Pennsylvania, ss:

I, Edward R. W. Searle, Clerk of the Circuit Court of the United States of America for the Middle District of Pennsylvania in the Third Circuit, do hereby certify that the above and foregoing paper is a true copy of the judgment entered by the Court in the case of John Flannelly and Mary Flannelly vs. The Delaware and Hudson Company, No. 124, January Term, 1908, so fully and entire as the same remains on file and among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Scranton this seventh day of April, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.]

E. R. W. SEARLE,
Clerk of the United States Circuit Court for the Middle District of Pennsylvania.

And afterwards to wit on the twenty second day of March, A. D. 1909, this cause being called for argument on the transcript of record from the Circuit Court of the United States for the Middle District of Pennsylvania, before Hon. George Gray, and Hon. Joseph Buffington, Circuit Judges, and Hon. Edward G. Bradford, District Judge, and being argued by counsel for the respective parties and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards, to-wit, on the nineteenth day of May, A. D. 1909, comes the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion, to wit:

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1909.

No. 29.

THE DELAWARE AND HUDSON COMPANY, Plaintiff in Error.
vs.
JOHN FLANNELLY and MARY E. FLANNELLY, Defendants in Error.

Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

Before Gray and Buffington, Circuit Judges, and Bradford, District Judge.

BRADFORD, *District Judge:*

John Flannelly and Mary Ellen Flannelly, his wife, the defendants in error, brought an action of trespass in the circuit court of the United States for the Middle District of Pennsylvania, against the Delaware and Hudson Company, the plaintiff in error, hereinafter called the defendant, to recover damages for bodily injuries to Mrs. Flannelly, the loss of her husband of her services, and the injury and destruction of certain personal property through the negligence, as alleged, of the defendant. It is alleged in substance in the statement of claim, among other things, that while the plaintiff, Mrs. Flannelly, was with due care attempting to drive a horse and wagon across the railroad tracks of the defendant at a point where they cross at grade a public highway on which she had been travelling, leading from Scranton to Pittston, Pennsylvania, the defendant "so negligently operated its freight trains upon said tracks as to destroy the usual opportunity at said crossing, to see or hear approaching trains and then did negligently and unlawfully run her down by a rapidly propelled passenger train, commonly called the 'Flyer,' which train was behind time and was being run at said time at great and unreasonable speed, and negligently approached said crossing without due and timely warning of its ap-

proach." The case was tried before a jury and a verdict was found as follows:

"The jury do find in the above case in favor of the plaintiff Mary Flannelly in the sum of $2,000, and in favor of John Flannelly in the sum of $500.00. Defendant Company was negligent in failing to sound the blast of a whistle at the proper place and at the proper time at the crossing of the Def't where the plaintiff Mary Flannelly received her injuries."

A motion for judgment non obstante veredicto was denied and judgment in favor of the plaintiffs was entered on the verdict. The assignments of error though six in number raises in substance only the two following questions: First, was there or not sufficient evidence of actionable negligence on the part of the defendant to justify the jury in finding its existence? And, secondly, if the defendant was guilty of such negligence, did or not contributory negli- ce on the part of the plaintiff so clearly appear that the court below was bound to render judgment for the defendant non obstante veredicto? The counsel for the defendant at the hearing virtually abandoned, and, we think, properly, the contention that it had not been culpably negligent, and treat as "the real and vital point in the case" the question of contributory negligence. There is evidence in the case to the effect that Mrs. Flannelly on the morning of July 30, 1907, was driving a horse attached to a light lumber wagon, in which she and two small boys were riding, on her way from her home in Pittston township, Luzerne county, Pennsylvania, to the city of Pittston, about five miles distant, that to reach her destination she proceeded on a public highway which run, through the village of Dupont or Smithville; that in pursuing this route it was necessary to cross at grade the railway tracks of the defendant from — to west and, in approaching those tracks, to cross at grade the double tracks of the Lehigh Valley railroad "cut-off" distant from the defendant's tracks several hundred feet; that the defendant's tracks were three in number and at the crossing parallel to each other and running in a generally northerly and southerly direction; that on the westerly side of the defendant's tracks and in close proximity to them there was a switch or branch track of the Lehigh Valley railroad extending to a coal breaker about half a mile north of the crossing; that between the Lehigh Valley railroad "cut-off" and the defendant's tracks and at the distance of between 20 and 50 feet from the latter there was a place where persons, driving such a conveyance as that occupied by Mrs. Flannelly, usually stopped to look and listen before undertaking to cross the defendant's tracks; that Mrs. Flannelly after crossing the "cut-off" stopped at the usual place, she then being from 40 to 50 feet from the defendant's tracks, and looked and listened for approaching trains before undertaking to cross those tracks; that when she reached that place she saw a long freight train of high box-cars coming round a curve in the track from the north on its way southwardly towards Pittston; that it was moving slowly and she waited for it to pass; that it passed over the crossing on the track of the defendant nearest to her; that while thus waiting two trains, one moving north and the other south, passed behind her on the tracks of the Lehigh Valley

railroad "cut-off," and still another train passed to the north over the crossing on the switch or branch of the Lehigh Valley railroad which was the fourth track from her; that she did not see any train passing on the third or westerly track of the defendant; that after the freight train on the first or nearest track had moved to the south and cleared the crossing some distance and she had looked and listened in vain for an approaching train or a danger signal, she drove to and upon the first track so far that the head and front feet of the horse were on the second track, and there again stopped and looked and listened without seeing or hearing any approaching train; that she then drove on until the horse was over the middle of the second track when she first saw the train, the locomotive of which struck the wagon; that at this juncture the horse reared and pranced and delayed her several seconds notwith-standing her application of the whip to him several times and that she drove across the second track but not far enough to clear the locomotive which struck the hind wheel of the wagon throwing its occupants out. Whether Mrs. Flannelly was delayed on the second track by unmanageable behavior on the part of the horse she was driving was a question for the jury. It is to be assumed that the jury believed she was. Had it not been for that delay the accident undoubtedly would not have happened. But this circumstance does not necessarily negative the existence of contributory negligence on her part operating as a proximate cause of the accident. She had, it is true, a right in the pursuit of her lawful journey to Pittston to use the public highway notwithstanding the fact that in so doing she would cross the defendant's tracks. It was expected and intended that the public using that high way should pass over the crossing. Otherwise the crossing would not have been placed there. But she was bound under existing conditions to exercise due care and circumspection in attempting to pass over the defendant's second track. There is uncontradicted testimony to the effect that while Mrs. Flannelly was accustomed to driving horses, the horse driven by her at the time of the accident was "kinder skittish sometimes." If, however, she in all respects observed reasonable care and caution in attempting to cross the tracks, we should not be prepared to hold that unmanageable behavior on the part of the horse, whether attributable to a restive or excitable nature or to the noise of passing trains, should be imputed to her as a fault. But from a careful examination of the evidence before us it is clear beyond all reasonable doubt that Mrs. Flannelly did not observe such care and circumspection as the law required of her, and that there was nothing before the jury to justify a verdict importing that she had exercised such care and circumspection. The uncontradicted evidence shows that the Dupont or Smithville crossing was considered and was a dangerous one to any person negligently passing over it; that Mrs. Flannelly lived in the neighborhood and was familiar with the crossing; that at the "usual stopping place" a person at a distance of 40 feet from the first or easterly track of the defendant could, unless his view was obstructed by a passing train or other object, see a train approaching from the south at the distance of 2,300 feet; that about 600 or 800 feet to the south

of the crossing the defendant's tracks curved to the west passing under the viaduct of a traction company situated about 1950 feet below the crossing; and that owing to such curvature trains on any of the defendant's tracks below the crossing and above the curve would be calculated to conceal an approaching train whether below or above the viaduct. There is testimony to the effect that the train which struck the wagon was a fast passenger express known as the "Flyer"; that it was behind time; and that it was moving at a high rate of speed as it came northwardly round the curve to the south of the crossing and while approaching the point of collision. Mrs. Flannelly's own statement condemn- her as negligent. Her testimony relative to the freight train of box-cars is in part as follows:

"Q. You say while you were stopped there before you went on the track, that a train passed on the D. & H. on the nearest track to you?

"A. Yes, sir.

"Q. You are very sure about that?

"A. I know the train passed on that track.

"Q. It was going towards Pittston?

"A. Yes, sir.

"Q. That is, going southerly?

"A. Yes, it was going towards Pittston. * * *

"Q. How far had the train that was on the track nearest to you gone over the crossing, before you started to go over?

"A. Towards the shanty.

"Q. What did you say?

"A. Towards the shanty,—the flag shanty, some kind of a shanty was there—There was a little shanty there.

"Q. Would you say it was a hundred feet?

"A. I could not say that, it might have been more than a hundred feet; I couldn't say that for certain.

"Q. Would you say it was as much as two hundred feet?

"A. I might if I was there and took an interest; I haven't been there and took an interest of it since.

"Q. You started to go across that track?

"A. Yes, sir.

"Q. This train which was going down on the track nearest to you cut off your view way down the road, did it not?

"A. Yes, sir, cut off my view until I got on the second track,—when the horse was on, and the engine pushing roght towards me from up the valley—I couldn't make escape."

Here, then, was a woman of maturity, of sound mind, familiar with the crossing, knowing that from the usual stopping place she could see, in the absence of any obstruction, a train approaching from the south as far away as the viaduct or even further, who waited until the train of box-cars shut off her view to the south, and did not wait, notwithstanding the manifest danger of such an omission, until the defendant's tracks were sufficiently clear to enable her to cross them in safety. It is hard to conceive of a more negligent or reckless disregard of one's safety than was displayed by her in attempting to cross the defendant's tracks at the particular time she did and under the then existing conditions. Further; on her own showing,

uncontradicted in the case, she failed to observe due care not only in undertaking to cross the tracks before she had an unobstructed view of them to the south, but in starting as she did from her first stop on the tracks when she was behind the rear end of the receding train of box-cars. She testified as follows: "Q. How far could you see down the second track, when you stopped the second time with your horse's feet about the first track? A. To the nearest of my judgment, I should think about three hundred feet." With this limited scope of vision it was perilous to the last degree to attempt to cross the second track as she did. She states that at the point of her second stop where she had only this limited view of the track to the south she "looked and listened up and down the track" before starting. That this was an utterly inadequate precaution is palpable in view of the fact that a train coming up the second track at the rate of 50 or 60 miles an hour would cover from 75 to 85 feet each second. But we do not attach so much importance to what Mrs. Flannelly did after reaching the first track as to what she did before. The horse she was driving may have became excited by the noise of passing trains and unmanageable, and she may have lost her presence of mind and resorted to mistaken tactics. The fatal error she committed was in leaving the "usual place" and getting on the tracks before she had an unobstructed view. Her uncontradicted statements disclose contributory negligence on her part. There was nothing in the case to warrant a verdict based upon an absence of all contributory negligence, and as there was nothing to warrant such a verdict the motion for judgment non obstante veredicto should have been granted. The judgment below must be reversed, with costs, and it is so ordered.

(Endorsed:) United States Circuit Court of Appeals for the Third Circuit. No. 29. March Term 1909. The Delaware and Hudson Company vs. John Flannelly and Mary E. Flannelly. Opinion of the Court. Filed May 19, 1909.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1909.

No. 29.

DELAWARE AND HUDSON COMPANY, Plaintiff in Error,
vs.
JOHN FLANNELLY and MARY E. FLANNELLY, Defendants in Error.

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the middle district of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by

this court, that the judgment of the said circuit court in this cause be, and the same is hereby reversed with costs.

Philadelphia, May 24, 1909.

GEO. GRAY,
Circuit Judge.

Filed June 10, 1909.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1909.

No. 29.

DELAWARE & HUDSON CO., Plaintiff in Error,
v.
JOHN FLANNELLY et ux., Defendants in Error.

Motion and Reasons for Re-Argument.

Now, June 9th, 1909, defendants in error, by their attorney, Paul J. Sherwood, move the Court for a re-argument of the above entitled appeal, and assign in support thereof the following reasons:

Owing, as we believe, to an oversight of certain facts in evidence, to wit:

(*a*) The fact that the train on the side track nearest Mrs. Flannelly was standing, not receding, when she attempted to cross;

(*b*) The fact that the defendant failed to give warning of the approach to the crossing of the train that did the damage.

(*c*) The fact that the case was submitted to the jury on the admitted theory of the defendant as shown by its photographs.

The Appellate Court has erred to the material injury of the defendants in error.

1st. In segregating the one fact of plaintiffs' case, to wit, the distance Mrs. Flannelly, under the excitement and circumstances of her situation was of opinion she could see before she drove forward from her stopping place from said other facts in evidence.

2nd. In drawing too rigidly against the plaintiffs, under all the circumstances, the rule of contributory negligence.

Argument.

It is apparent from a reading of the opinion of the Appellate Court, that the crucial reason upon which the reversal of the judgment in favor of plaintiffs was based, was that Mrs. Flannelly should have waited for the train on the track nearest her to have receded far enough from the crossing to have allowed her a more extended view of the tracks in the direction from which the train that damaged her came.

The Court in its opinion says in part: "Here then, was a woman of maturity—who waited until the train of box-cars shut off her view to the south, and did not wait, notwithstanding the danger of such

an omission, until the defendant's tracks were sufficiently clear to enable her to cross in safety. She failed to observe due care not only in undertaking to cross the tracks before she had an unobstructed view of them to the south, but in starting as she did from her first stop on the tracks when she was behind the rear end of the receding train of box-cars."

With all due respect to the Court we say there is a misapprehension of the evidence on this particular phase of the case. The train that pulled in upon the nearest track to her was not receding when the accident occurred.

William White, a sewing machine agent, out collecting, testified he crossed the same crossing but a few moments in advance of Mrs. Flannelly, going the same way, and was standing about the fourth or fifth house shown in the row (see map) and saw the accident, everything.

That when he crossed the tracks he saw cars standing on the fourth track (from him, which would be the first track to Mrs. Flannelly), and that he is positive about that.

His evidence in that feature is as follows:

William White, record, page 112:

"Q. How did you go to this house; did you go across this same crossing when you came to it?

"A. I came over that crossing.

"Q. When you went up to that house?

"A. I went over that crossing—went collecting in the first red house, and then I collected to the second house and then I went to the fourth house.

"Q. There were no cars standing on the fourth track at the time you went over first?

"A. Yes, sir, there was.

"Q. You are very positive about that?

"A. Sure.

"Q. How far were they below the crossing?

"A. I could not say how far—they were above the crossing. They were beyond the shanty that was there, and they have since moved that shanty—they have made a different change."

Mrs. Alice Aherns, whose home is on the same side of the track from which Mrs. Flannelly approached, was sitting on her back porth facing the scene of the accident, and saw it. She testified there was a train of high coal cars standing at that point, at the time of the accident, and that the hind end of it was about at the second red house. That would tally with where the hind end of the train was said to be by Mrs. Flannelly when she attempted to cross.

Mrs. Alice Aherns, record, pages 98 and 99:

"Q. Now, with reference to the other trains, what did you observe.

"A. Well, there is a side track there, and there was a train on—I could not say how many cars, standing on that side track—they were coal cars—I think they were coal cars; they were not freight cars.

"Q. Were they high cars?

"A. They were quite high—high coal cars.

"Q. And that was on the side track?

"A. Yes, sir.

"Q. When you say the side track, that is the first track?

"A. That is the first track—it was used for a side track always.

"Q. Can you give us some practical idea about where the hind end of that train was at the moment that you saw Mrs. Flannelly struck—I mean this train that you say was standing?

"A. Well, it stood about to that second red house."

Mr. William Strubeck was riding on the caboose of the Lehigh Valley train on the last track over from Mrs. Flannelly and witnessed the accident. He testified the train on the first track Mrs. Flannelly would come to was standing, the hind end about 150 to 200 feet distant from the crossing, and that the same was high coal cars.

William Strubeck, record, page 71.

"Q. Which track was she on?

"A. On the furthest track—there was a coal train standing on the switch track—the furthest track over.

"Q. About where, as near as you can recollect, at the moment—at the immediate time of the accident, was the hind end of that coal train?

"A. Well, about 150 feet from the crossing—about 200 hundred feet from the crossing.

"Q. Of course you didn't measure it?

"A. No, sir, I didn't.

"Q. That was the train that was upon the first track when she came up?

"A. No, sir, it was—yes, sir, it was the train on the first track.

"Q. And were those high cars?

A. Yes, sir, big cars—the coal train standing on the first track to this woman."

It will thus be seen that the Appellate Court either misapprehended or failed to observe at least a part of the evidence on this most salient feature, and that the Court is mistaken when it says (opinion, page —). "On her own showing, uncontradicted in the case, she failed to observe due care not only in undertaking to cross the tracks before she had an unobstructed view of them to the south, but in starting as she did from her first stop on the tracks when she was behind the rear end of the receding train of box cars."

We admit it may be a fair inference from her own evidence that the train which she thought to be on the track nearest her was receding, but we submit it is just as strong or a stronger inference that it was standing at the time.

She does not say it was receding at the time. In the portion of her evidence quoted by the Appellate Court in its opinion it is true she says a train passed on the D. & H. track nearest her, and that it was going toward Pittston. That of course was true while it was passing. She also further says in answer to a question by counsel for defendant as to whether the train "which was going down on the track nearest to you cut off your view way down the road," &c. "Yes, sir, cut off my view until I got on the second track," &c., but

that portion of her evidence should not be segregated from the balance of her own evidence nor from the other evidence in the case.

If the Court will be kind enough to examine the photographs it will see just how it cuts off the view "way down." But it does not, and did not at the time cut off the view of from 300 to 500 feet of the track nearest her. The photographs show that, moreover she testifies (merely giving her judgment) that she could see when she started forward about 300 feet.

But that is not all of her evidence. On page 45 of the record it will be seen she says of the train on the track nearest her: "I stopped at the usual stopping place, until we saw this train coming around the curve. It was a long box-train—going toward Pittston—it was going very slowly, and we took the pains to wait, and after this train passed the crossing, quite a little ways down toward the shanty, we drove to the first track, I stopped there, and looked and listened up and down the track, but couldn't see or hear anything; no signal of any kind, and we drove on to the track," &c.

She says the train on that track was passing "very slowly." Two other witnesses, Charles Strubeck, page 64, and Gilfeather, page 86, say, "there was a freight train slowly coming down the track." All the evidence for the defense is to the effect that that track was only a side track on which cars stopped for trains on main line to pass. The only witnesses in the whole case who were asked point blank as to whether the train was standing or receding at the time Mrs. Flannelly drove on and the accident occurred were the three witnesses already referred to, White, Aherns and Wm. Strubeck, and they all testify the train on that track was "standing," and place the hind end or "caboose" about where the little shanty then was, the point to which Mrs. Flannelly testified the train had passed when she started forward and drove upon the tracks.

Suppose, for argument, we take the most adverse inference from Mrs. Flannelly's evidence and say she testified the train nearest her was receding when she drove forward.

Suppose in the excitement of her perilous surroundings she is honestly mistaken about the train receding at the time and that the three witnesses, White, Aherns and Strubeck are right when they testify it was standing.

Or, suppose she is mistaken as to which track the train passing was on, and the fact is the passing train was not upon the first track, but there was one upon the third track only from her passing south as contended by the defendant, and as shown by its photographs offered in evidence, which defendant claims shows the true situation as it was at the time. Is she out of court?

Suppose, as testified by White, there were cars standing on the first track when he crossed a few minutes in advance of her, and that they remained and were standing there and in the excitement of the many trains about her she is honestly mistaken as to which track the passing train was on. She claims to have seen one train only going south. Suppose she is honestly mistaken as to which track it was on. Is she out of court?

The Appellate Court in its opinion says: (Opinion, page —).

"But we do not attach so much importance to what Mrs. Flannelly did after reaching the first track as to what she did before. The horse she was driving may have become excited by the noise of the passing trains and unmanageable, and she may have lost her presence of mind and resorted to mistaken tactics."

If the foregoing is sound reasoning, and it certainly is, is it not just as appropriate to the situation at every passing moment from the time of the first stop?

Was she not hemmed in by passing trains all the time?

Were there not trains at her back and trains in front of her all the time?

The testimony is that the horse was shy and nervous and she had the horse to manage. She sat in the middle of the seat and a small child clung to each of her arms. No signal was given by those in charge of the approaching train.

If there were cars standing on the first track to the south of her, as testified by Wm. White, or if, as she thought, the passing freight train was on that track, and that came to a stop and was there standing, as testified by Aherns, Strubeck and White, whichever may be true, so long as she did her part, so long as she stopped and looked at the usual stopping place, where she had a good view at the time, and stopped again at a second place and looked and listened, and could see 300 feet or farther and was not otherwise proceeding carelessly, we submit the question of her negligence is for a jury, particularly where the defendant failed to give warning of the train's approach.

For "care is a relative term, or rather, conveys a relative idea as to the degree necessary to be observed under circumstances. It is different, certainly, when there is reason to apprehend danger, from that degree of care to be exercised when it is not to be apprehended. Here it (the failure to blow whistle) may have made a great difference."

R. R. Co. v. Ogier, 35 Pa., 60, (1860).

"The general rule is that every person has a right to assume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty to such other person."

Cyc. of Law and Practice, Vol. 29, p. 516, e, citing U. S. authorities.

Mrs. Flannelly when she first drove up to the crossing and first stopped at the usual stopping place, and looked had a clear view down the greatest possible distance, probably 2000 feet or upwards. She then stopped, she looked, she listened.

Quoting from her evidence, page 46 of record:

"Q. Now, at the time you first stopped, as you say, that was at the usual stopping place?

A. Yes, sir.

"Q. Whether or not you had a view down the tracks—Pittston way?

"A. Yes, sir. There was a clear view down."

She further testified there was at that time no train in sight and no signal of the approach of any from that way. That it was while so standing that the train approached from the opposite direction. That she waited until it had passed the crossing some little distance. She then drove till she came to the tracks and while her horse was upon the first tracks, his feet about at first rail of second track, she again stopped, looked and listened. She could see fully three hundred feet Pittston way. (That was a mere estimate without actual measurement.) No train was then in sight. No signal of the approach of any was given and she therefore drove forward.

Now, what more, we ask, could this woman have done? If she could have done more, what more should she have done? As a reasonably prudent person could any more be required of her, particularly, when the defendant threw her off guard by failing in its duty to her, to give warning of the train's approach, a fact found by the jury.

Had she not a right to expect that the trainmen would give notice of the train's approach by the steam whistle a sufficient time to warn her from the danger line? Was the care all one-sided?

We ask this Appellate Court in all seriousness to hear us in this case. From the opinion of this Court there is no appeal. We therefore ask the same ruling applied as in cases where an appeal is allowed.

Will the Court carefully examine the authorities cited and measure the facts of this case with the requirements of law?

If so, the judgment already found in the plaintiffs' favor must be re-instated and sustained.

Appellate Court erred in segregating fact of the failure to wait longer before attempting to cross from the fact found by the jury that defendant failed in its duty to give warning by the whistle of the train's approach.

Authorities.

"Conceding that a railway train has the right of precedence at a crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding the collision. It is accompanied with, and conditional upon, the duty of the train to give due and timely warning of its approach."

Mr. Justice Bradley in Cont. Improvement Co. v. Stead, 95 U. S. 161, (1877).

The foregoing case was an appeal to the Supreme Court of the United States on error to the Circuit Court of Appeals of the United States for the District of Indiana.

Plaintiff, a boy sixteen years old, approached on foot a crossing

of double tracks of defendant's railroad over a street. After crossing the streets the tracks curved sharply, and took a direction at right angles to their former course.

Plaintiff's testimony showed that before going upon the crossing he looked in both directions along the track, which on the side of the curve he could see as far as a tunnel, thirteen hundred feet away. There was no train in view from that direction, but one was approaching from the other on the other track, and he waited until it had passed him twelve feet, and then, looking along the other track and seeing no train, he started to cross, but was struck by a train coming from the opposite direction, and injured. There was thick smoke coming from the train which passed, and settling near the ground, and the train itself as it rounded the curve obstructed the view on the other track, except perhaps for one hundred and fifty feet.

There was also evidence that the train which struck plaintiff was moving at a speed of fifteen miles an hour, in violation of a city ordinance, which prohibited a greater speed than six miles.

Held: (Wallace, Circuit Judge) That in view of such evidence, and the noise made by the train which had passed, the question of plaintiff's contributory negligence was for the jury, and a judgment of non-suit reversed.

Farrell v. Erie R. R., 138 Fed. Rep., 28, (1905).

"In an action against a railroad company to recover damages for personal injuries, it appeared that the plaintiff was injured at a grade crossing where there were five tracks, on four of which rapidly moving trains ran frequently. He was riding on a long lumber wagon and was seated twenty feet back of his horses' heads near the hind axle, a position from which he could reach the brake. He stopped when his horses were twenty feet from the tracks and he was about forty feet from them, and waited until a train had passed west three hundred feet. This was the usual place where drivers stopped, but from it he could see only about three hundred feet either way. Within twenty feet of the track there was an obstructed view for fourteen hundred feet. After the train had passed, the plaintiff looked and listened as he drove on the crossing. When his horses were on the second track and the front of his wagon on the first he saw a train coming east around a curve fifteen hundred feet away. He hastened to get across, but one of the hind wheels of his wagon was struck when on the last rail of the fourth track by a train which, according to the testimony of his witness, was running fifty-five miles an hour, of the approach of which no warning had been given. Held, that the case was for the jury and that a verdict and judgment for plaintiff should be sustained."

Calhoun v. P. R. R., 223 Pa., 298, (Adv. Rep. Apr. 30, 1909).

"A person approaching a railroad crossing is not bound to anticipate that an approaching train will proceed at an unlawful or an unusual rate of speed, and is not chargeable with negligence, as matter of law, in attempting to cross, if, in view of the distance at which the track seems to be clear, he would have time to cross before a train going at the usual and lawful speed would reach the crossing."

Farrell v. R. R. Co., 138 Fed. Rep., 28, (1905).

"The plaintiff was bound to use ordinary care, which was to be greater or less, according to the circumstances in which he was placed, and the dangers which a person of ordinary prudence would have reason to apprehend.

"He was not required to anticipate (negligence on part of defendant in the running of its train)." * * * "The question whether his attempt (to cross) was one which an ordinarily prudent person would not have made was a question upon which fair-minded men might reasonably differ. Some weight is to be given to the presumption that those who are crossing a track in front of an approaching train, guided by the instinct of self preservation, will not place themselves in imminent peril of life or limb by making the attempt without allowing a proper margin of safety." * * * "When different inferences fairly may be drawn from the facts, and different minds may be led reasonably to different conclusions upon the evidence, it is error to take the question of negligence from a jury."

Farrell v. R. R. Co., 138 Fed. Rep., 28, (1905).

In the case at bar the Appellate Court never once referred to or considered the defendant's remissness in its duty to blow the whistle in passing upon the contributory negligence of the plaintiff, Mrs. Flannelly. No doubt this was due to inadvertence, for there is no precedent for so rigid an application of the rule where, as in this case, a traveler first stops and looks when she has a clear view of 2000 feet or more, the track is then clear, this view is then shut off partially by a passing train of defendant in one direction which pulls by and either slows up or stops after passing, where the traveler does not then pass immediately upon the tracks but waits till she has a view more or less extended, 300 feet or more, when she again stops, looks and listens, and when there is then no train within sight, and no signal of one's approach given, and she is not struck when going upon the tracks but when going off, her horse rearing and delaying her upon the track for a few seconds.

This failure to give warning by whistle is the nip of this case. Mrs. Flannelly had a right to expect this. It is usual. The law requires that it shall be done. She was accustomed to expect it. Defendant failed to give it. The jury has found that fact against the defendant, properly, as held by this Appellate Court. Hence, it is evident a different degree of care or vigilance on her part is required, for her vigilance might have been somewhat allayed without negli-

gence on her own part by this very failure of duty on part of the defendant.

Cont. Impr. Co. v. Stead, 95 U. S., 161, (1877).
Farrell v. Erie R. R. Co., 138 Fed. Rep., 28, (1905)

The rule in Pennsylvania is the same as in the United States Courts.

"If there was no notice by blowing the whistle, a thing required to be done before reaching the point, and usually done, a traveler accustomed to expect this, would not only not be so likely to look out for danger, or be in such preparedness to avoid it, as he otherwise might have been, and this without any culpable negligence on his part. For, if by the negligence of those in charge of the train his vigilance was allayed, they are not at liberty to impute the consequences of their act to his want of vigilance, a quality of which they deprived him. If their acts brought him within the boundaries of peril, they must answer for the result of that condition."

Ogier v. R. R. Co., 35 Pa., 60, (1860).

"In determining the negligence of a plaintiff in a case of this character, it is often necessary not only to consider her conduct on the occasion, but also that of the defendant. This was at the crossing of a street where both parties had a right to be. Each party had also the right to act with the belief that the other would exercise his right at the place in the manner and way his duty required him to do. The duty of the defendant company's employés in charge of the locomotive was that of care required at a grade crossing." * * * "The plaintiff was justified in believing that the defendant's employés would perform their duties in this respect, and she could act on such belief without any imputation of negligence."

Bard v. R. R. Co., 199 Pa., 94, (1901).

"Now, Doud had a right to assume that due notice would be given of the approach of an engine by whistle and bell." * * * "The jury by their verdict have said that these warnings were not given.

"When all these circumstances are considered in connection with the action of Doud, he cannot be conclusively presumed to have been negligent in attempting to cross the tracks of the defendant company."

Doud v. R. R. Co., 203 Pa., 227, (1902).

"If a proper signal had been given at the whistle-post, 1,387 feet away, the chances are that the deceased and his son would have heard it and that they would not have been placed in this most dangerous position. In determining the duty of the deceased at the time, regard must be had not only to his own conduct, but that of the defendant company," &c. * * *

"The plaintiff was justified in believing that the defendant's employés would observe the care required in approaching a grade crossing, and he could act on such belief without any imputation of negligence."

Bickel v. R. R. Co., 217 Pa., 456, (1907).

"Plaintiff was responsible for none of the circumstances. He knew the view of the track was obstructed, but one who had superior knowledge allayed his apprehension." No signals.

Fennell v. Harris, 184 Pa., 578, (1898).

The foregoing authorities state the rule not only in the United States and Pennsylvania, but in Indiana, Kansas, Massachusetts, Missouri, New Jersey, New York, California, District of Columbia, Illinois, West Virginia, Iowa, Michigan, England and Canada.

29 Cyc. of L. & P., p. 516, *e.* and notes.

It will therefore be seen that the Court draws the rule entirely too rigidly against the plaintiff.

"A traveler is not to be held to a rigidly correct judgment. It is for the jury to say whether she exercised care according to the circumstances. Sight and sound were both interfered with by the defendant."

Stead v. Construction Co., 95 U. S., 164, (1877).
Farrell v. Erie R. R. Co., 138 Fed. Rep., 28, (1895).
Howard v. B. & O. R. R. Co., 219 Pa., 358, (1908).
Derk v. R. R. Co., 164 Pa., 243, (1894).
McNeal v. R. R. Co., 131 Pa., 184, (1890).

"Stopping is opposed to the idea of negligence, and unless, notwithstanding the stop, the whole evidence shows negligence so clearly that no other inference can be drawn from it, the court cannot draw the inference as a conclusion of law, but must send the case to the jury."

Calhoun v. R. R. Co., 223 Pa., 298, (1909).
Adv. Reps., April 30, 1909.
R. R. Co. v. Tate, 151 Fed. Rep., 550, (1907).

This case is for a jury. The question of contributory negligence is not one of law, whether uncertainty arises from a conflict of testimony, or, because the facts being undisputed fair minded men will honestly draw different conclusions from them.

R. R. Co. v. Powers, 149 U. S., 43, (1893).
Steamship Co. v. U. S., 205 U. S., 187, (1906).

Again we call attention to the fact of the unmanageableness of her horse as an element relieving her of the charge of contributory negligence.

Cromley v. R. R. Co., 211 Pa., 429, (1905).
Newman v. R. R. Co., 203 Pa., 530, (1902).
McNeal v. R. R. Co., 131 Pa., 184, (1890).
Newhard v. R. R. Co., 153 Pa., 417, (1893).

To recapitulate we contend:

(*a*) The Appellate Court misconceived or overlooked the evidence when it ruled the case against the plaintiffs on the ground that Mrs. Flannelly drove upon the tracks behind a "receding" train.

(*b*) Drew the rule too rigidly in a case where the defendant failed in its duty to signal the train's approach.

(*c*) Erred in segregating the fact that Mrs. Flannelly did not longer wait from other fact, particularly the evidence showing either that there were standing cars on first track and Mrs. Flannelly is herself mistaken about which track train was on, or that the train stopped and remained standing while she attempted to cross, and the further fact of defendant's entire lack of care.

What could Mrs. Flannelly have done more? True she might have waited longer before driving upon the tracks, but she had already made two stops and no notice was given by the company of its desire to use the tracks at the time. Had they given her notice she would have waited longer. The evidence shows her willingness to observe care. She was not proceeding recklessly. She stopped as people usually do where they usually do. She went further and stopped again. She proceeded and was careful to look and listen as she proceeded. She saw the train at the earliest possible moment. It was not bearing down upon her when she drove on. It is not the case of one driving in front of a train which could have been seen. The train was not within the possibility of vision, even from the usual stopping place, till Mrs. Flannelly was on track No. 2 from her and the horse was rearing. Her rig was not hit as she approached, but in the rear wheel.

What should she have done more? It cannot be stated. Surely, the judgment in plaintiff's favor should stand.

Distances in Which Train Could Have Been Seen as Party Drove on Crossing Behind Receding Trains, and Recovery Allowed.

Receding train passed 12 feet. Could see 100 feet. Receding train hid all but 150 feet. Walking across. Hit first track. Undue speed. No signals. Verdict for plaintiff sustained by United States Circuit Court of Appeals.
Farrell v. R. R. Co., 138 Fed. Rep. 28 (1905).

Receding train. 300 feet.
Calhoun v. R. R. Co., 223 Pa., 298 (1909).

Receding train. 50 or 100 feet.
Kuntz v. R. R. Co., 206 Pa., 162 (1903).

From usual place, could see 80 feet; from point at edge of gates, could see 160 feet. Judgment for plaintiff affirmed.
Messenger v. P. R. R. Co., 215 Pa., 500 (1906).

From a point 50 feet from track—view 150 feet. Whistle, 1000 feet. Non-suit reversed.
McNeal v. R. R. Co., 131 Pa., 184 (1890).

From a point 10 yards from crossing could see 150 feet. Non-suit reversed.
Schum v. P. R. R. Co., 107 Pa., 8 (1884).

70 feet from tracks—view 300 feet. Judgment reversed with venire.

Crane Co. v. P. R. R. Co., 218 Pa., 564 (1907).

From a point 20 feet from tracks could see 500 feet. Non-suit reversed.

Cromley v. P. R. R. Co., 208 Pa., 446 (1904).

Crossed behind receding train when could see 300 feet. No whistle. Recovery confirmed.

Calhoun v. R. R. Co., 223 Pa., 298 (1909).

Same. Could see 240 feet.

Wolfe v. R. R. Co., 22 Supr. Ct., 335 (1903).

We have cited authorities both from the United States Courts and from Pennsylvania. The rulings are the same in both jurisdictions. The rule of law is, that where local law or custom has been established by repeated decisions of the highest courts of a state, it becomes the law governing courts of the United States sitting in that state.

Detroit v. Osborne, 135 U. S., 492 (1889).
Burgess v. Seligman, 107 U. S., 20.
Clairboyne v. Brooks, 111 U. S., 400.
Barnes v. Columbia, 91 U. S., 540.
Clark v. Russell, 97 Fed. Rep., 900 (1899).

The damage alleged was done in Pennsylvania, hence we cited the decisions of the State together with the authorities of the Supreme and Circuit Court of Appeals of the United States, and respectfully request consideration thereof.

Submitted on Defendant's Own Theory.

It should not be overlooked that the case was submitted entirely on the admitted theory of the defendant, that is, that there was no train on the track nearest to Mrs. Flannelly, that she is mistaken in that, and that the photographs offered in evidence by the defendant is the true theory and negligence was found against them on that theory of the case.

See charge of Court, page 29 of Record.

In conclusion, we therefore respectfully submit that a rule to show cause why a re-argument of this case should not be granted should be allowed by this honorable Court, so that the facts and the law relating thereto may be clearly and accurately brought to its attention, not so much for the reason that these particular plaintiffs may be protected in the assertion of their rights at this time, as for the purpose of conserving to the public in general those principles which would seem to be of vital importance to the humane administration of the law.

All of which is respectfully submitted by,

PAUL J. SHERWOOD,
Attorney for Defendants in Error.

II.

Opinion of Appellate Court.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1909.

No. 29.

THE DELAWARE AND HUDSON COMPANY, Plaintiff in Error,
vs.
JOHN FLANNELLY and MARY E. FLANNELLY, Defendants in Error.

Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

Before Gray and Buffington, Circuit Judges, and Bradford, District Judge.

BRADFORD, *District Judge:*

John Flannelly and Mary Ellen Flannelly, his wife, the defendants in error, brought an action of trespass in the Circuit Court of the United States for the Middle District of Pennsylvania, against the Delaware and Hudson Company, the plaintiff in error, hereinafter called the defendant, to recover damages for bodily injuries to Mrs. Flannelly, the loss to her husband of her services, and the injury and destruction of certain personal property through the negligence, as alleged, of the defendant. It is alleged in substance in the statement of claim, among other things, that while the plaintiff Mrs. Flannelly, was with due care attempting to drive a horse and wagon across the railroad tracks of the defendant at a point where they cross at grade a public highway on which she had been traveling, leading from Scranton to Pittston, Pennsylvania, the defendant "so negligently operated its freight trains upon said tracks as to destroy the usual opportunity of said crossing, to see or hear approaching trains and then did negligently and unlawfully run her down by a rapidly propelled passenger train, commonly called the 'Flyer,' which train was behind time and was being run at said time at great and unreasonable speed, and negligently approached said crossing without due and timely warning of its approach." The case was tried before a jury and a verdict was found as follows:

"The jury do find in the above case in favor of the plaintiff, Mary Flannelly in the sum of $2,000, and in favor of John Flannelly in the sum of $500.00. Defendant company was negligent in failing to sound the blast of a whistle at the proper place and at the proper time at the crossing of the Deft where the plaintiff Mary Flannelly received her injuries."

A motion for judgment non obstante veredicto was denied and judgment in favor of the plaintiffs was entered on the verdict. The assignments of error though six in number raise in substance only

the two following questions: First, was there or not sufficient evidence of actionable negligence on the part of the defendant to justify the jury in finding its existence? and, Secondly, if the defendant was guilty of such negligence, did or not contributory negligence on the part of the plaintiff so clearly appear that the court below was bound to render judgment for the defendant non obstante veredicto? The counsel for the defendant at the hearing virtually abandoned, and, we think, properly, the contention that it had not been culpably negligent, and treat "as the real and vital point in the case" the question of contributory negligence. There is evidence in the case to the effect that Mrs. Flannelly on the morning of July 30, 1907, was driving a horse attached to a light lumber wagon, in which she and two small boys were riding, on her way from her home in Pittston township, Luzerne county, Pennsylvania, to the city of Pittston, about five miles distant, that to reach her destination she proceeded on a public highway which ran through the village of Dupont or Smithville; that in pursuing this route it was necessary to cross at grade the railway tracks of the defendant from east to west and, in approaching those tracks, to cross at grade the double tracks of the Lehigh Valley railroad "cut-off" distant from the defendant's tracks several hundred feet; that the defendant's tracks were three in number and at the crossing parallel to each other and running in a generally northerly and southerly direction; that on the westerly side of the defendant's tracks and in close proximity to them there was a switch or branch track of the Lehigh Valley railroad extending to a coal breaker about half a mile north of the crossing; that between the Lehigh Valley railroad "cut-off" and the defendant's tracks and at the distance of between 20 and 50 feet from the latter there was a place where persons, driving such a conveyance as that occupied by Mrs. Flannelly, usually stopped to look and listen before undertaking to cross the defendant's tracks; that Mrs. Flannelly after crossing the "cut-off" stopped at the usual place, she then being from 40 to 50 feet from the defendant's tracks, and looked and listened for approaching trains before undertaking to cross those tracks; that when she reached that place she saw a long freight train of high box-cars coming round a curve in the track from the north on its way southwardly towards Pittston; that it was moving slowly and she waited for it to pass; that it passed over the crossing on the track of the defendant nearest to her; that while thus waiting two trains, one moving north and the other south, passed behind her on the tracks of the Lehigh Valley railroad "cut-off," and still another train passed to the north over the crossing on the switch or branch track of the Lehigh Valley railroad which was the fourth track from her; that she did not see any train passing on the third or westerly track of the defendant; that after the freight train on the first or nearest track had moved to the south and cleared the crossing some distance and she had looked and listened in vain for an approaching train or a danger signal, she drove to and upon the first track so far that the head and front feet of the horse were on the second track, and there again stopped and looked and listened without seeing or hearing any approaching train; that she then drove on until the horse was over

the middle of the second track when she first saw the train, the locomotive of which struck the wagon; that at this juncture the horse reared and pranced and delayed her several seconds notwithstanding her application of the whip to him several times; and that she drove across the second track but not far enough to clear the locomotive which struck the hind wheel of the wagon throwing its occupants out. Whether Mrs. Flannelly was delayed on the second track by unmanageable behavior on the part of the horse she was driving was a question for the jury. It is to be assumed that the jury believed she was. Had it not been for that delay the accident undoubtedly would not have happened. But this circumstance does not necessarily negative the existence of contributory negligence on her part operating as a proximate cause of the accident. She had, it is true, a right in the pursuit of her lawful journey to Pittston to use the public highway notwithstanding the fact that in so doing she would cross the defendant's tracks. It was expected and intended that the public using that highway should pass over the crossing. Otherwise the crossing would not have been placed there. But she was bound under existing conditions to exercise due care and circumspection in attempting to pass over the defendant's second track. There is uncontradicted testimony to the effect that while Mrs. Flannelly was accustomed to driving horses, the horse driven by her at the time of the accident was "kinder skittish sometimes." If, however, she in all respects observed reasonable care and caution in attempting to cross the tracks, we should not be prepared to hold that unmanageable behavior on the part of the horse, whether attributable to a restive or excitable nature or to the noise of passing trains, should be imputed to her as a fault. But from a careful examination of the evidence before us it is clear beyond all reasonable doubt that Mrs. Flannelly did not observe such care and circumspection as the law required of her, and that there was nothing before the jury to justify a verdict importing that she had exercised such care and circumspection. The uncontradicted evidence shows that the Dupont or Smithville crossing was considered and was a dangerous one to any person negligently passing over it; that Mrs. Flannelly lived in the neighborhood and was familiar with the crossing; that at the "usual stopping place" a person at a distance of 40 feet from the first or easterly track of the defendant could, unless his view was obstructed by a passing train or other object, see a train approaching from the south at the distance of 2,300 feet; that about 700 or 800 feet to the south of the crossing the defendant's tracks curved to the west passing under the viaduct of a traction company situated about 1,950 feet below the crossing; and that owing to such curvature trains on any of the defendant's tracks below the crossing and above the curve would be calculated to conceal an approaching train whether below or above the viaduct. There is testimony to the effect that the train which struck the wagon was a fast passenger express known as the "Flyer;" that it was behind time, and that it was moving at a high rate of speed as it came northwardly round the curve to the south of the crossing and while approaching the point of collision. Mrs.

Flannelly's own statements condemn her as negligent. Her testimony relative to the freight train of box-cars is in part as follows:

"Q. You say while you were stopping there before you went on the track, that a train passed on the D. & H. on the nearest track to you?

"A. Yes, sir.

"Q. You are very sure about that?

"A. I know the train passed on that track.

"Q. It was going towards Pittston?

"A. Yes, sir.

"Q. That is, going southerly?

"A. Yes. It was going toward Pittston. * * *

"Q. How far had the train that was on the track nearest to you gone over the crossing, before you started to go over?

"A. Towards the shanty.

"Q. What did you say?

"A. Towards the shanty—the flag shanty, some kind of a shanty was there—there was a little shanty there.

"Q. Would you say it was a hundred feet?

"A. I could not say that, it might have been more than a hundred feet; I couldn't say for certain.

"Q. Would you say it was as much as two hundred feet?

"A. I might if I was there and took an interest. I haven't been there and took an interest of it since.

"Q. You started to go across that track?

"A. Yes, sir.

"Q. This train which was going down on the track nearest to you cut off your view way down the road, did it not?

"A. Yes, sir, cut off my view until I got on the second track—when the horse was on, and the engine pushing right towards me from up the valley—I couldn't make escape."

Here, then, was a woman of maturity, of sound mind, familiar with the crossing, knowing that from the usual stopping place she could see, in the absence of any obstruction, a train approaching from the south as far away as the viaduct or even further, who waited until the train of box-cars shut off her view to the south, and did not wait, notwithstanding the manifest danger of such an omission, until the defendant's tracks were sufficiently clear to enable her to cross them in safety. It is hard to conceive of a more negligent or reckless disregard of one's safety than such a display by her of attempting to cross the defendant's tracks at the particular time she did and under the then existing conditions. Further; on her own showing, uncontradicted in the case, she failed to observe due care not only in undertaking to cross the tracks before she had an unobstructed view of them to the south, but in starting as she did from her first stop on the tracks when she was behind the rear end of the receding train of box-cars. She testified as follows:

"Q. How far could you see down the second track, when you stopped the second time with your horse's feet about the first track?

"A. To the nearest of my judgment, I should think about three hundred feet."

With this limited scope of vision it was perilous to the last degree to attempt to cross the second track as she did. She states that at the point of her second stop where she had only this limited view of the track to the south she "looked and listened up and down the track" before starting. That this was an utterly inadequate precaution is palpable in view of the fact that the train coming up the second track at the rate of 50 or 60 miles an hour would cover from 75 to 88 feet each second. But we do not attach so much importance to what Mrs. Flannelly did after reaching the first track as to what she did before. The horse she was driving may have been excited by the noise of the passing trains and unmanageable, and she may have lost her presence of mind and resorted to mistaken tactics. The fatal error she committed was in leaving the "usual place" and getting on the tracks before she had an unobstructed view. Her uncontradicted statements disclose contributory negligence on her part. There was nothing in the case to warrant a verdict based upon an absence of all contributory negligence, and as there was nothing to warrant such a verdict the motion for judgment non obstante veredicto should have been granted. The judgment below must be reversed, with costs, and it is so ordered.

Filed May 19, 1909.

Charge of the Court.

GENTLEMEN OF THE JURY: It is a delicate and difficult thing either for judge or jury to decide between man and man, and a judge's position is somewhat easier than a juror's, because if a judge makes a mistake, (having merely to pass on matters of law) there are higher courts to correct him; whereas a juror must decide the case on the merits; has got to go into the facts; reconcile conflicting testimony; decide which witnesses are to be believed, and which are to be rejected, and, applying the common sense judgment of ordinary life, arrive as best they can at justice. Persons who are not telling the truth, may have the appearance of doing so; one who is truthful may not appear that way; may hesitate perhaps in his testimony, in his excess of trying to be careful, and so not convey a good impression; and taking it altogether, there may be such conflict—such opposition on one side and the other, as to make it most difficult for a juror to see where he should go.

It seems to me that this case presents, and warrants, much of what I have said. On the one side it is contended here that this company was negligent upon that occasion, causing this accident and injury, and that the plaintiff, Mrs. Flannelly, has been seriously and permanently injured as the outcome. On the other hand, it is contended that the company did all that could have been expected under the circumstances, and that the accident occurred not through fault of theirs, but really through the fault or negligence of Mrs. Flannelly herself, and that if she experienced any injury upon that occasion she only has herself to blame for it; and, further, that such as she did receive is not at all what appears on the surface, and that

her present apparent condition is due to hysteria; is put on, or simulated, and not actual. It is your good sense, gentlemen, that has got to unravel this problem; it is for you to say, apply your best judgment to the facts as I shall endeavor to present them to you, where the truth in this case lies, and what will be justice between these parties. You are to be guided by your judgment, let me warn you, and not carried away by sympathy. You are to render a verdict based on that altogether. You are not entitled to render a verdict, (or to give a verdict as we sometimes say, although that sometimes implies you are making a gift and not deciding it) except as the testimony warrants it, and according to that testimony.

As I have said to you, the charge here is that the people who were running that train, representing the defendant company, were negligent upon that occasion; that is to say, that in some particular they failed of that which was required of them. Unless this is made out by the weight of the evidence, your verdict must be in favor of the defendant. This point is not to be slurred over or evaded; you must meet it squarely in your own mind, and when you are discussing the case in the jury room, and unless you are satisfied by the weight of the evidence that the company is convicted of negligence, your verdict cannot be in favor of the plaintiff, you must be able, as I say, to put your finger upon something which you regard as a failure on the part of the company to meet this duty, before you prepare to render a verdict against them. This is so important that I will ask you, if your verdict should be in the plaintiff's favor, to specify in what particular the defendant company was negligent.

Let us look then at the different matters that are suggested to make out negligence, and, first, with regard to the character of the crossing. It is said that this was a grade crossing, and therefore dangerous, and possibly it has been argued to you that it ought not to be allowed to continue; but there is nothing to show that the defendant company is responsible for that condition. The feeling no doubt is against grade crossings, because of the danger to travelers by reason of them, and the policy of some railroads is to do away with them as much as possible; but streets and highways are not altogether under the control of the officers of the railroads; nor have we anything to show in this instance how it happened with regard to this one, whether the railroad was run over the highway; that is to say, whether the highway was in existence at the time the railroad was located, or whether it has been laid across it since and it has not been shown, either, how far a change would be feasible, or that the township or borough officers, whichever character of municipality this is, would consent to an over-head or underground crossing; nor can any stress be laid upon the number of tracks that were there; no doubt they were somewhat numerous. Not only were there three tracks of the defendant company, but there is what is spoken of as the Lehigh Valley cutoff, and the Lehigh Valley track on the westerly side of the defendant's railroad, all of which, no doubt, assist to complicate the situation; but, at the same time, this company of course has a right to have enough tracks there to accommodate its business, and

it is hardly chargeable with negligence because of endeavoring in this way to meet that necessity. More serious is the suggestion that there is nothing in the way of safety gates or an automatic electric alarm signal, nor a flagman, which sometimes are provided to guard such a crossing; but that is expected in settled towns, in places that are built up; in streets of cities and boroughs, where there is constant travel, rather than out in the country on a dirt road or sparsely settled community. As some stress has been laid upon this, let me read you what has been said upon the subject by the Supreme Court of the United States, which lays down the law for all of us: "It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing it must be first shown that such crossing is more than ordinarily hazardous; as for instance, that it is in a thickly populated portion of a town or city, or that the view of the track is obstructed either by the company itself or by other objects, proper in themselves, or that the crossing is a much traveled one and the noise of the approaching trains is rendered indistinct, and the ordinary signals difficult to be heard by reason of absolute confusion incident to railway or other business, or by reason of some such light cause, and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country." Now, were there any such conditions as are so described here, calling for any thing of this character in the way of safety gates or a flagman? The scheduled trains of the two companies making use of these tracks, only in the daylight hours, make about one train in twenty minutes. There are not, certainly, so very many people passing across that track, according to the count that has been made of them. The people living about there are not, as I understand it, in the immediate vicinity, except this row of red houses where a few families live. The place is, essentially, in the country, and not in the town or city. There are no obstructing buildings about there, if I am right in my knowledge of the place, and these photographs in evidence are to be relied upon; so that it seems to me you have very little, if anything, on which to base the contention that the company were negligent in leaving that crossing without some such protection as that. Now then, if there is nothing in the condition of the crossing requiring anything of this nature, or upon which negligence can be based for the lack of it, the only other thing is as to the running of the trains out of which negligence can arise. It is said that this train was running with undue speed. But people demand that; the people want fast trains. You and I if we get on a passenger train, complain if it is not going at a pretty good speed. We don't want to ride on a slow train; we avoid them; we want to get there; and what the public demand, the railroad companies, as public servants, respond to; their trains are expected to run at a high rate of speed and you are not to hold the companies to a different liability in the jury box, for what you would if you were sitting as a passenger. This was practically an open country, as I have already said. It is true there are houses there. I may misconstrue this locality, you have

seen it, and know more about it than I do;—and there was nothing, if I am right about it, that called for a slowing down of this train as it approached thir crossing by reason of its being built up about there, and according to the engineer, the steam had been shut off; the train was going down there—not down a very severe grade, simply by gravity. I will not stop over the matter of ringing the bell, that has been so positively testified to that it seems to me you have got to accept it. I doubt whether it would have been very effective in any event, under all the circumstances. The contention on the part of the plaintiff that should be urged upon you, as I understand, as a basis of the claim of negligence is, that the whistle was not blown. Where a railroad crosses a highway at grade, the railroad company, of course, has rights on it, and the traveling public, by wagon or by foot are also entitled to make use of it, and each must have due regard to the other. The railroad cars cannot get off the track; individuals can; therefore in a way and to a certain extent the individual must look out for himself. But there is a certain measure of responsibility, of course, demanded of those who are running upon the railroad, and it is to be expected that a railroad train coming to a crossing at a reasonable and proper distance from it will give notice of that fact by blowing a whistle. People know this, and look out for it; it is the customary warning. The question is, whether it was given in this case. On the defendant's side we have the testimony of Milo Gardner, the engineer, and Mr. Mason, the fireman of the locomotive of the defendant's passenger train, that at the usual place, at the whistling post, about 1400 feet to the south of this crossing, the whistle was blown in the ordinary way, two long and two short blasts. There was no statement as to this made by the conductor, baggeman or brakeman on the train, because they were all inside, and were not noticing. But, confirming the testimony of the engineer and fireman, we have all the men who were in charge of the passing Jersey Central train, who all testified, to a man, that they heard this warning whistle given. Mr. Richards, the engineer, so testifies, and Mr. Becker, the fireman; Mr. Searfoss, the brakeman, and Mr. Krebbs, the flagman. I believe that they put the place somewhat nearer than the whistle post; for instance, Mr. Richards, the engineer of the New Jersey Central train, speaks of it as having been given about seven or eight hundred feet from the crossing. On the plaintiff's side, however, Mrs. Flannelly says she did not hear any whistle; that she listened for such a signal, and looked up and down the track before venturing across it. Charles Strubeck, who was on the caboose of the Lehigh Valley train says he heard no signal; and his cousin, William Strubeck, who was with him, also did not. Neither did Gilfeather who was at work on the Hexter house near there; nor Roy Wallace who was with him; the only whistle they heard being the danger signal when the train was about on Mrs. Flannelly. Alice Aherns heard a whistle, but then the train was not far from the crossing; she says the whistle might have been given for the crossing, and she not hear it; and, quite significant, we have the testimony of William Whites, the sewing machine agent who was up making collections along the row of red houses, and he was up somewhere near

where the head of the Jersey Central train would be, if I remember aright, where the people who were on that train met the other, the passenger train, and while they say that they heard the signal, he says that none was given, or that he heard no signal. As weakening, perhaps, his observation, it may be noted that he says he did not hear the danger signal either. Now, was there a warning given by whistle of the approach of this train at a place where it was to be expected, and where it would be effective, and notice of the coming of the train? Positive evidence on such a point, gentlemen, is much more satisfactory than what we call negative evidence. A person who did hear, is more apt to be correct than someone who said he didn't hear, because if the person didn't hear, it may be that the thing occurred even if he didn't; it depends upon how far his attention was directed to the matter. We all know the bells strike, and whistles blow, and we have our attention directed to something else, and we don't notice them; they pass with a thousand things that are going on around about us, our attention being directed to something else. The only value therefore of what I call negative testimony, of people who say they did not hear or did not see, is that their attention was attracted or directed to it, so that they would have seen or heard, if it had occurred, it seems to me, it is to be noted, that the only way we can prove that a thing did not occur, is by just such testimony; if there was no whistle blown, in this case, the only way you can show it is by those who were about there, and who did not hear it; the value of their saying they did not hear it depending, I say, upon whether their attention was directed to it, and therefore, taking all this testimony back and forth, it is for you to say whether a whistle was blown at a proper place by this oncoming passenger train? If it was, then there was no negligence on the part of this company to be attributed to them upon that score; if it was not, that would be a failure to warn people who were going across the track, who were about to make use of it, that would warrant a jury in saying they were negligent.

Should you find that the defendant company did all that was required of it upon that occasion, your verdict then would be in favor of the defendant. But, there is something more in the case than that. It is contended on the part of the company here that the evidence shows Mrs. Flannelly to have, herself, been guilty of negligence, and that it was by reason of that, rather than by any want of care on the part of the company, that this accident occurred, or, in other words, that without making proper observation of what was going on down in the direction from whence this train was coming, she drove on to the track, virtually driving in front of the oncoming train, and her wagon was struck. She says, as you will recall, that she first stopped about fifty feet from the crossing at a place which was the usual stopping place for making observations. She says there was a train standing on the track nearest to her (that is what is spoken of as the idle track); and there are one or two other witnesses, I believe, who say the same thing, but the weight of the evidence is so decidedly the other way that I am sure you will not accept that statement, and I shall treat it as though that was not really

the case. On the far track, however, was a Jersey Central freight train, which was passing in the direction of Pittston. Mrs. Flannelly says that she waited for it to clear the crossing. Wesley Sagor, this deaf young man, crossed ahead of her; and the train that was coming was so apparent to him that he stopped the butcher wagon that was on the other side from attempting to cross. The Jersey Central train, however, was hardly out of the way when Mrs. Flannelly drove on, to go across. She says that she stopped a second time, I believe, when she was about 12 feet from the easterly track, and looked again, and at that point she saw and heard nothing, and went on; but hardly was her horse on the track when this passenger train came into sight like a flash, as she says, out of the *smo*ke and the dust; she gave her horse a hit, the horse stopped, seemed to rear or balk, and then she gave it another hit, the horse getting across, but the engine coming down hit the back of the wagon. The criticism of her, and the charge of negligence which is made against her, which it is claimed prevents her from recovering here is, that she crossed before she had a clear view in the direction in which this train was coming. The freight train, as I have said, was going towards Pittston; there was a curve in that direction, and this train being a long one, with these high box-cars, it obscured her view of the track beyond; that I believe is the uncontradicted evidence. One of the photographs which have been put in evidence shows by the engine, which is standing as the passenger engine in this case was, just before the accident, about at a point where the head of the freight train would be, and another train is interposed there, so that this photograph is claimed to illustrate the condition that would confront this woman as she drove upon the track; or in other words, while she could look down the track for a certain distance, three, four or five hundred feet, if you believe her view was obstructed beyond that, and that was the critical part of the road which she needed to see. Mrs. Flannelly, herself, testifies, if I have understood her aright, that this train cut off her view until she got on to the second track, and the passenger train was right upon her, so that she could not escape. That, if I have recorded her testimony aright, is her own statement. Or, if you take it in its broadest sense, before she had a view that really amounted to anything that showed her what was beyond, that showed her whether she could safely venture on the track, she ventured on, and the accident happened. If she went forward in that way, before she had made a proper observation, or taken a position to see what was coming, she took the risk, and the fault is her own; even though the company were negligent she could not hold them because her negligence would be such that it — bar a recovery. It is useless for a person to say that they took care or to endeavor to persuade a jury that they did, if they drove on to a railroad track without looking, without listening, without using the senses which we are given for our own protection. We know that trains run fast, and that a few hundred feet observation is of no practical use or advantage, and if that is all the far we can see when we drive on to a track, we cannot recover in a court of justice. This woman was bound to have a view that would amount to some-

thing, far enough so that she could see what was coming, and if she ventured across without that she is convicted of negligence, and your verdict should be for the defendant. You must decide, then, first, that the defendant company failed to exercise the care that they should have exercised upon that occasion, and that the injury resulted from that; and, second, that Mrs. Flannelly, was free from contributory negligence on her part, or you cannot find in her favor. Of course I cannot say how your verdict on this point will be, and I will therefore briefly discuss the remaining question in the case, which is one of damages.

There is a serious conflict here. The plaintiffs claim that Mrs. Flannelly, one of them, has been not only injured, but permanently injured. They say she was frightened, shocked upon that occasion, as well as being thrown from her wagon, and her body bruised; that as a result of this a mis-carriage came about; following which her present condition has developed greatly; that she has a wry-neck; and a curved spine; that the flesh of her body has wasted under these circumstances, and that she has lost strength and the ability to take care of her ordinary affairs, where before she was more than usually active, competent and able to take care of the large family which she has, and to do most of the work not only in the house but in the fields, outside of it. On the other hand it is contended by the company that testimony of physicians has been given to the effect that the wry-neck which she apparently has, could not be the outcome of what has happened, that it is to be attributed to an hysterical feeling, or hysteria, the fruitful source, as it is said, of supposed but unreal ailments. It is not contended that this good woman simulates this condition, but does it honestly. People under hysterical conditions, as I understand it, are in dead-earnest, they believe absolutely that to which they give the appearance. A person who thinks he is sick, under hysterical impulse, you cannot persuade him he is well; so that it is not necessary in the consideration of this case, if you believe the defendant's testimony with regard to it, to conclude that if Mrs. Flannelly is assuming or simulating or feigning a wry-neck that she is actuated by anything dishonest, or that it is a matter gotten up for this case, that does not necessarily result at all, nor would your verdict to the contrary necessarily so convict her; but all of this, of course, is a matter for you, having heard the testimony back and forth, it is for you to say whether she is injured, and to what extent she has been injured. Whether it is something that will pass away, or whether it is fastened upon her, likely to increase rather than lessen, in deciding upon the question of damage, the matter of compensation is to be kept in view, what would reasonably compensate these parties, assuming that the injury is of the character it has the appearance of; if she is permanently injured, of course the damages would be more than if she is only temporarily so.

You will notice that Mr. Flannelly, as well as Mrs. Flannelly are joined together here as plaintiffs; each, according to the practice in such cases, asks a verdict at your hands, but the two things are to be distinguished. The husband sues for what he has lost or been at the expense of by reason of her injury; he is responsible for the

bills of the doctors, and the nurse, or medicines, or for what he might be liable for in that line if her present condition should continue; these are to be considered and allowed for. On her part you have the suffering that she has endured, or that she is likely to endure, and the physical effect upon her, the impairment of her body, particularly if it is permanent, or if it is likely to go on, or the contrary. Now, about this. I cannot advise you at all; you have got to use your best judgment, if the case reaches that phase of it, and decide as to each of these plaintiffs what would reasonably compensate or make up to them respectively for this injury.

As I have already endeavored to say to you, you are to remember that you are deciding between man and man; you are to be as considerate for the one side as for the other; you are not to let your minds be influenced by passion or prejudice but you are to be controlled by cool and dispassionate deliberation and judgment.

If you decide in favor of the plaintiffs, somebody has got to foot the bill. I mean to say it is not simply a corporation unaffected by the fact that that corporation is made up by individuals, it comes out of the stockholder's pockets—you, me, or somebody.

I will refer to some points which have been submitted. I think I have so far covered those on the part of the plaintiff that I will not stop over them.

Referring to those of the defendant, I will refuse the First, Second, Third and Fourth without reading.

"5th. The undisputed evidence showing that in the absence of any obstructing trains the traveler upon the highway had a clear view of the track in the direction from which the train which it is alleged to have caused the injury came, for a distance of more than fifteen hundred feet, the plaintiff, Mrs. Flannelly, if that view were temporarily obstructed by a passing train, should have waited until the train had progressed far enough to clear the view. If she started to cross immediately behind the passing train which obstructed the view, she took her chances of getting across safely, and if she failed was guilty of contributory negligence."

I have already endeavored to so instruct you, gentlemen, and I affirm this point.

"6th. Upon the question as to whether the proper signals were given by whistle and bell at the proper places, mere negative testimony of witnesses who say that they did not hear such signals, is of very little weight as in rebuttal of positive testimony, that such signals were given."

I have already endeavored to say that, and that point is affirmed.

The seventh point I will refuse without reading.

"8th. There is no evidence in the case that there were such dangers peculiar to the crossing where the accident occurred as would require the defendant to in any way limit the speed of the trains passing over that crossing."

That is a correct statement of the law.

"9th. The plaintiffs are not entitled to recover for any injuries, consisting of or resulting from mere fright, excitement or mental distress, in the absence of physical injury."

That is affirmed.

"10th. If the jury believe from the evidence that the plaintiff, Mary Flannelly, jumped from the wagon before it was struck by the train and reached the ground without bodily injury, the plaintiffs are not entitled to recover, even though she may have suffered great mental distress resulting in hysteria or any other ailments."

That point is a little vague to me; if it means that she could not recover for mere mental suffering or distress, even though that went to the extreme of hysteria, I think it correctly states the law. Beyond that, I hardly am prepared to go.

"11th. If the jury believe from the evidence that the immediate cause of the accident was the momentary stopping of the horse upon the tracks either of his own volition, or by reason of the act of the plaintiff, Mary Flannelly, the plaintiffs cannot recover."

That is to say, if the negligence was the negligence of the horse, (not of the people who were running the railroad) or Mrs. Flannelly; if that was the sole cause of the accident, there can be no recovery.

As I said to you, you are to render two verdicts, if in favor of the plaintiffs, stating the amount of damages which you give to the husband, if anything, and also separately the amount of damages which you allow to the wife; and in that case I will ask you, as I have already said, to specify in what particular you find that defendant company was negligent. If your verdict should be the other way, you simply will render one verdict that you find in favor of the defendant.

III.

Opinion of Trial Court on Rule for Judgment Non Obstante Veredicto.

James H. Torrey for rule.
Paul J. Sherwood for plaintiff, opposed.

ARCHBALD, *District Judge:*

The jury found that the defendant company was negligent in not giving due warning by blowing the whistle of the engine, of the approach of the train to the crossing where the plaintiff was struck and injured, and I see no occasion to disturb that finding in view of the conflicting evidence on the subject.

The right to judgment, notwithstanding the verdict, depends therefore on whether the plaintiff was clearly convicted of contributory negligence on the undisputed evidence. It is said that she was, by her own testimony, that she drove right on to the track where she was injured as soon as the train which was passing on the track beyond had cleared the crossing, without waiting until she got an unobstructed view in the direction from which the train that struck her was coming, the view being obscured by a curve in the track and the passing train being made up of high box-cars. I confess that this was the impression I got at the trial and I charged the jury accordingly. But upon going over the stenographer's notes I

find that I was mistaken, or at least, it was not so clear, that I would have been justified in taking the case from the jury and directing a verdict, and if so I cannot now enter judgment notwithstanding it. The evidence of course was for the jury, unless so completely one way that there could be but one conclusion to be drawn from it. And the rule with regard to contributory negligence having been fully explained to them, it must be assumed that they properly applied it and found that the plaintiff did not drive on to the tracks until she had waited a suitable time so as to have a sufficient view and be able to make such an observation, as was required of her before doing so. Besides that it is uncontradicted evidence that the horse stopped or balked just as he got upon the track, without which the plaintiff would have not got safely over, the train as it was merely striking the hind wheel of the wagon. It was thus the unexpected action of the animal which really brought about the accident, the plaintiff having apparently started in sufficient time to get across if this had not happened, the train, according to her statement, not having yet come in sight. If, therefore, she was not negligent in starting to cross as the jury in this view of the evidence might properly find, there was nothing *to* standing in the way of a recovery.

Filed June 28, 1909.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1909.

No. 29.

THE DELAWARE & HUDSON COMPANY, Plaintiff in Error,
vs.
JOHN FLANNELLY and MARY FLANNELLY, Defendants in Error.

Sur Motion for Reargument.

Brief for the Delaware & Hudson Company, Defendant Below and Plaintiff in Error.

It is difficult to treat with the requisite degree of courtesy or to follow with patience the tergiversations of counsel for plaintiffs below and defendants in error in this case. It is now seriously and in reiterated italics contended that the plaintiff's view of the tracks was obstructed by a *standing* train on the track nearest her as she approached.

That there was no train upon that track at all was established by evidence so overwhelming that the trial judge said to the jury in his charge, "I am sure you will not accept that statement and I shall treat it as though that was not really the case."

The fact is, as was contended by the defendant, that the train which obstructed the view was passing on the third track and was a Jersey Central freight train. The Court may recollect that during the oral argument, the counsel who files this motion was interrupted

by his honor, Judge Gray, with the inquiry whether his location of the passing train on the nearest track would not make the case harder for the plaintiffs than if it were passing as the defendant contended, on the third track. We do not recollect that any satisfactory answer was made to this question.

Assuming, however, for the sake of the argument, that there was sufficient evidence to warrant the finding that there was a train on the first track; that the jury so found; and that notwithstanding Judge Gray's query that fact would minimize plaintiff's contributory negligence; the question still remains, Did plaintiff's counsel contend that that train was standing or moving?

The exigency of his case seems now to require him to maintain that it was standing. This Court is charged in his brief with falling into grievous error in its opinion where it said "she failed to observe due care * * * in starting as she did when she was behind the rear end of *the receding* train" (page 2), which charge is followed by the positive assertion *"that the train that pulled upon the nearest track to her was not receding when the accident occurred"* (id.).

A few excerpts from the original brief of counsel for plaintiffs will make it clear that in speaking of that train as a "receding" train the Court merely adopted his own theory of the facts.

"While she stood there looking and listening, a train composed of high box cars made its appearance around the corner coming from the direction of Scranton going towards Pittston, which would be South, and slowly *pulled over* on and upon the switch track next to her standing horse *and on down the crossing* in front of her on the track she must first cross. Mrs. Flannelly waited until the *hind end of the freight train had passed her a sufficient distance to allow another view* of the track to the South" (page 2).

"So that when this woman stood with her rig facing the track with the desire to cross there were two trains with two engines at her back and at least and possibly three different heavily loaded freight and coal trains *passing in front of her horse's head*" (page 3).

"While they stood waiting at the usual stopping place a train of defendant composed of box cars *passed the crossing on the track next nearest her* going towards Pittston" (page 5).

"The train on the nearest track to Mrs. Flannelly *was moving slowly South* (page 6).

"After this train of box cars had *pulled past the crossing to the South* it cut off her view way down the road, as testified by her in response to a question on cross-examination" (page 10).

"Furthermore, the train of box cars on the nearest track to Mrs. Flannelly, the approaching flyer which did the damage, and the other trains about her *were* constantly on the move. * * * "

"It is not always contributory negligence per se for a person to attempt to cross a railroad track without waiting for a train *which has just passed* to have gone so far as to leave unobstructed the view of another train approaching on a parallel track in a contrary direction" (page 13).

In reviewing the case of the West Jersey Railroad vs. Ryan, counsel says:

"That case is very different from the one under consideration where the traveller, a woman, drives up a hill to the usual stopping place, stops there, has a lengthy view of the tracks to the South and there is no train upon them, waits there *until two trains come from the North proceeding to the South pass the crossing, still waits until the hind end of the train on the tracks nearest her is some distance from the crossing,*" etc. (page 27).

"She had stopped and looked and listened at the usual stopping place and is positive that the train which damaged her is not yet within the possible range of vision. Other trains then appear and *she waits till they pass the crossing*" (page 31).

We have carefully re-read this original brief and can find nowhere between its covers any suggestion that the train upon the first track was *standing*, to offset the above numerous assertions that it was moving, passing, *"receding."*

To support the contention that the train was standing, counsel quotes from the testimony of three witnesses William White, Alice Ahearns and William Strubeck. Independently of the fact that the testimony of these witnesses is wholly inconsistent with that of the defendant herself and of all of her other witnesses and all of those of the defendant upon this point, their evidence is inherently improbable, if not wholly unworthy of belief.

William White, upon cross-examination, was very vague and uncertain both as to the character of this supposed train on the nearest track and as to whether or not it was in motion. This witness was, at the time of the accident, upon the opposite side of the railroad and speaks of this track as the fourth track. On page 112 of the record, upon cross-examination, he testifies as follows:

"Q. Was there an engine attached to them or not?

A. I could not say whether there was an engine attached to it or not—I did not examine it.

Q. You couldn't tell whether it was standing still or moving on the fourth track?

A. Not at that moment, I hadn't taken exact notice of it.

Q. You didn't pay any attention to it anyway?

A. I noticed them standing there, but I didn't take interest into it; *they could have been moving or not, I could not say.*"

Witness Alice Ahearns is similarly uncertain on her cross-examination (Record, pp. 104-105):

"Q. Did you see the freight train coming down over the crossing towards Pittston?

A. Well, I didn't take notice of it.

Q. You didn't take notice of it at all?

A. No, sir.

Q. You didn't notice the Lehigh Valley train either?

A. No, sir, I didn't notice the Lehigh Valley train.

Q. Then the only train that you really saw was the passenger train?

A. The passenger train and the train on the track.

Q. Was there a locomotive attached to that?

A. I could not tell you.

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Q. You don't know whether there was or not?
A. No, sir.
Q. *You could not be sure that it was not moving?*
A. *I don't think it was moving.*"

All of the witnesses upon both sides agree that there was a freight train passing over the crossing southward and the Lehigh Valley train crossing northward, yet this witness did not see either one and is uncertain as to whether the train she thought was on the nearest track to her was moving or not.

Witness William Strubeck not only has this train standing on the track at the time of the accident but for several days before. In his cross-examination on page 77 of the record appears the following:

"Q. When did you first see this—what you call a coal train, on the fourth track?
A. The train I was on?
Q. No, the D. & H.
A. Why I see that every day—I used to pass there, I seen that every day.
Q. Do you mean to say that that train was standing there for several days?
A. Yes, sir.
Q. And didn't move?
A. No, sir, blocked the crossing, used to stand there at the crossing and people couldn't see.
Q. Then there was no engine attached to it?
A. No, sir, no engine, not as I seen."

This witness' testimony, therefore, is wholly irreconcilable with any other testimony in the case and therefore not to be believed.

There is no dispute as to the fact that plaintiff's view of the tracks was obstructed by a train. It is evident that it appeared to the plaintiffs of importance that this train should be located upon the nearest track to her as she approached the crossing and they endeavored to prove that fact. It is to be remarked in passing that two of the witnesses who testified to it, namely C. H. Gilfeather and Roy Wallace, had testified before the Coroner's jury a few days after the accident, that there was no train upon the nearest track. The case, however, was presented by the plaintiffs in the court below and argued on appeal upon the theory that the freight train which obstructed the view South was a moving train which passed the plaintiff on the track nearest to her. In the desperate hope of securing a reconsideration of the case, that entire theory is now abandoned and upon the flimsiest sort of evidence the effort is made to persuade the Court that there was a standing train upon that nearest track. We cannot conceive that this effort to becloud the mind of the Court will be successful.

Even if the plaintiffs' present contention were sustained, we do not perceive how it would affect the result. If in fact there was a train standing just above the crossing on the track nearest the plaintiff as she approached, which wholly cut off her view, it would make necessary still greater caution on her part in making the crossing,

even if it required her to get out of her wagon and go ahead and lead her horse.

The motion for re-argument is based upon three specifications of oversight of fact on the part of this court as follows:

"(*a.*) The fact that the train on the side track nearest Mrs. Flannelly was *standing* not receding when she attempted to cross."

What has thus far been said is our answer to this proposition.

"(*b.*) The fact that the defendant failed to give warning of the approach to the crossing of the train that did the damage."

Certainly it cannot be seriously contended that the Court overlooked this fact; otherwise there would have been no occasion to have discussed the question of contributory negligence at all. The failure to give warning was the only act of negligence upon the part of the defendant which warranted the submission of the case to the jury at all and the only negligence of which the jury in its verdict found defendant guilty. Only by the express or implied recognition that the jury found this positive neglect on the part of the defendant could the discussion of the plaintiff's contributory negligence have any weight or relevancy.

The verdict of the jury is quoted in full in the opinion of this Court, which is an all sufficient recognition of the fact made conclusive upon the defendant by the verdict, that it was negligent in failing to give proper whistle signal.

"(*c.*) The fact that the case was submitted to the jury on the admitted theory of the defendant as shown by its photographs."

The defendant's theory of the facts was: First, that plaintiff recklessly drove upon the railroad immediately after the passing Jersey Central freight train had cleared the crossing and before it had gone far enough to clear her view. Second, that plaintiff jumped out of the wagon before its wheel was struck by the locomotive, was wholly uninjured, and that the "wry neck" which her own doctors said was a functional or hysterical and not an organic disorder, was entirely simulated. There being much evidence in support of both of these theories, they were of course submitted to the jury with instructions that if they found for the defendant upon either, the verdict must be in its favor.

Defendant further contended that even upon plaintiffs' theory of the facts they could not recover for the reason that their own evidence disclosed contributory negligence as a matter of law. Binding instructions were therefore requested.

Upon the argument of the rule for judgment non obstante veredicto in the court below and upon appeal here, defendant frankly admitted that the verdict was a negation of its theory of the facts and the case was presented and determined upon plaintiffs' own theory as developed in their brief and oral argument.

This Court in its opinion adopted precisely the theory of the plaintiffs' as expounded in the brief of their counsel and reached the conclusion contended for by the defendant, that under those facts plaintiff was clearly guilty of contributory negligence.

That plaintiffs' counsel sees fit at this late day to present a new theory of the facts not fairly deducible from the verdict of the

jury nor reconciliable with the plaintiffs' own testimony, can hardly be regarded as sufficient ground for burdening the Court with a re-argument.

We will not weary the Court by the repetition of the legal authorities cited in our original brief or by any additions to them. It is sufficient to say that they are ample authority for the conclusions of law reached in the opinion of this Court heretofore filed.

No sufficient reason has been presented for a re-argument of this case and the rule should be discharged.

JAMES H. TORREY,
Attorney for Plaintiff in Error.

WILMINGTON, DELAWARE, *July 30th*, 1909.

William H. Merrick, Esq., Clerk U. S. C. C. A., Philadelphia, Pa.

DEAR SIR: The motion for a rehearing in the case of Flannelly v. D. & H. Railroad Co. is denied. You will also stay the mandate in this case until further orders of the court. This is done in order that counsel may have time to apply to the supreme court for a writ of certiorari.

Yours truly, GEO. GRAY.

UNITED STATES OF AMERICA, *ss:*

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify that the foregoing pages from one to five hundred and three inclusive, *to* contain a full, true, complete and faithful copy of the original transcript of record and proceedings in the case the Delaware and Hudson Company, Plaintiff in Error, vs. John Flannelly and Mary Flannelly, Defendants in Error, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this thirty-first day of August, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Delaware & Hudson Company is plaintiff in error, and John Flannelly and Mary Flannelly are defendants in error, which

suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Middle District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of October, in the year of our Lord one thousand nine hundred and nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 21,831. Supreme Court of the United States. No. 605, October Term, 1909. John Flannelly et al., vs. The Delaware & Hudson Company. Writ of Certiorari.

In the Supreme Court of the United States, October Term, 1909.

No. 605.

JOHN FLANNELLY et al.
vs.
THE DELAWARE & HUDSON COMPANY.

Now, Oct. 25, 1909, it is hereby stipulated and agreed by and between the parties in above stated case that the certified transcript of record from the United States Circuit Court of Appeals for the Third Circuit, on file in above stated case in the United States Supreme Court, may be taken as a return to the writ of certiorari granted in said case by the United States Supreme Court and bearing date 19th day of October, 1909.

PAUL J. SHERWOOD,
Attorney for John and Mary Flannelly,
Defendants in Error.
JAS. H. TORREY,
Attorney for the Delaware & Hudson Co.,
Plaintiff in Error.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, by virtue of the foregoing Writ of Certiorari and in obedience thereto do hereby certify to the Supreme Court of the United States the consent of the Counsel for the respective parties thereto annexed as my return to the said writ,

on file, and now remaining among the records of the said Court, i
my office.

In Testimony Whereof, I have hereunto subscribed my name an
affixed the seal of the said Court, at Philadelphia, this first day o
November in the year of our Lord one thousand nine hundred an
nine and of the Independence of the United States the one hundre
and thirty-fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] No. 605/21831. —— Term, 190–. United State
Circuit Court of Appeals, Third Circuit. John Flannelly and Mar
Flannelly vs. The Delaware & Hudson Co. Certified Copy of stipu
lation of counsel as to return *of* Writ of Certiorari.

[Endorsed:] File No. 21,831. Supreme Court U. S. Octob
Term, 1909. Term No. 605. John Flannelly et al., Petitioner
vs. The Delaware & Hudson Company. Writ of certiorari and r
turn. Filed November 2, 1909.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1909.

JOHN FLANNELLY AND MARY ELLEN FLANNELLY,
Petitioners,

vs.

THE DELAWARE AND HUDSON COMPANY,
Respondent.

No. 132

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PAUL J. SHERWOOD,
Wilkes-Barre, Pa.

FRANK W. HACKETT,
Washington, D. C.
For Petitioners.

IN THE

SUPREME COURT

OF THE

UNITED STATES

JOHN FLANNELLY AND MARY ELLEN FLANNELLY,
Petitioners,

vs.

THE DELAWARE AND HUDSON COMPANY,
Respondent.

No.....

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PAUL J. SHERWOOD,
Wilkes-Barre, Pa.

FRANK W. HACKETT,
Washington, D. C.

For Petitioners.

PETITION FOR WRIT OF *CERTIORARI* REQUIRING THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES FOR ITS REVIEW AND DETERMINATION THE CASE OF THE DELAWARE AND HUDSON COMPANY, PLAINTIFF IN ERROR, VS. JOHN FLANNELLY AND MARY FLANNELLY, DEFENDANTS IN ERROR.

To the Honorable the Supreme Court of the United States:

The petition of John Flannelly and Mary E. Flannelly respectfully represents:

FIRST.

Your petitioners are husband and wife, residents and citizens of Pittston Township, Luzerne County, Pennsylvania, and were of lawful age and such resident citizens at the date of the grievance hereinafter mentioned.

SECOND.

The Defendant, a corporation of the State of New York and a citizen of that State operated at said date a railroad in said State of Pennsylvania.

THIRD.

July 30th, 1907, at about eleven o'clock a. m., said Mary was lawfully driving a horse attached to a one-horse lumber wagon on a public highway leading through the village of Dupont to the city of Pittston in said County.

FOURTH.

Said highway is crossed in said village of Dupont by the tracks of said defendant. There are four parallel

tracks at this crossing, three of which belong to the defendant. The crossing is in almost constant use by said defendant in the management of its trains, there being few intervals of time that there is not one or more trains crossing said highway.

FIFTH.

The railroad operated by defendant is so constructed that the opportunity to see to the north is very limited, owing to a curve about five hundred feet from the crossing, and limited to the south by any train passing southward to a greater or less extent, depending on which track the train is while passing, and the location of the train at the time one is looking.

SIXTH.

Said crossing has neither safety-gates, watchman, signal nor other device to warn travelers of approaching trains.

SEVENTH.

Said plaintiff, Mary, on said date, with due care attempted to drive across said crossing. At said time said defendant so negligently operated a freght train or trains upon and near said crossing upon one or more of its tracks as to interfere with the usual opportunity of seeing and to destroy the usual opportunity of hearing approaching trains, and then negligently ran her down by a fast express train called the "Flyer" upon its north bound track, which train was behind time, running down grade, at great speed and failed to give warning of its approach.

EIGHTH.

Said passenger train destroyed the wagon and harness and injured the horse belonging to the plaintiff, John, and hurled the said Mary to the ground and so injured her that she is a permanent sufferer, disfigured and crippled.

NINTH.

The said John and Mary, plaintiffs, brought a suit for damages against said defendant corporation, alleging substantially the committing of the injuries as just set forth, charging negligence on the part of said defendant and alleging due care on the part of said plaintiff, Mary. The declaration was filed in the Circuit Court of the United States, Middle District of Pennsylvania, 14th December, 1907.

TENTH.

The defendant at the January Term, 1908, of said Court, filed its plea of "Not Guilty."

ELEVENTH.

Upon issue joined the case came on for trial March 23, 1908, before the Honorable R. W. Archbald, District Court Judge and a jury.

TWELFTH.

The evidence showed, in part, that the plaintiff, Mary, was driving, as aforesaid, with two small boys in the wagon. That she was sitting in the middle of the seat and a small boy on each side of her. That upon approaching the crossing she stopped at the usual and customary place where travelers stopped to look and listen, and looked in both directions and listened. That place was about fifty feet from the first track. Head of horse about twenty or thirty feet. She saw a freight train round the curve from the north going southward. There was contradictory evidence as to whether this train was on the nearest track to her. She and some of her witnesses testified it was on the first track from her and was "slowing down" "running very slowly." Others testified it was on the third track from her. Some testified that after it passed the crossing it stopped. Others that a train was "standing" to the south of the crossing

on the track nearest her. There was also a train passing to the north on the fourth track from her, and at same time two heavy trains on another road a few hundred feet behind her on a railroad of the Lehigh Valley Railroad Company. The defendant contends that there was a freight train on the third track from her running south. Plaintiff, Mary, looked from the usual stopping place to the south before these trains interfered with her view and there was no train in sight coming from that direction and no signal of any then given. After the south-bound train had passed some distance to the south of the crossing, and, according to some of the evidence, had stopped "was standing," or "was slowing down," "almost stopped," said Mary drove forward from the usual stopping place till her horse's head was near the first rail of the north-bound track and there stopped a second time and listened. How far she could see to the south at that time is not clearly established, but she gave it as her judgment about three hundred feet. There was no train in sight approaching from the south and no signal of any was given. She drove forward until her wagon was on the second or north-bound track when she saw the express train coming out of a cloud of dust down by the viaduct, some thousand feet or more to the south. She spoke to the horse, he poked a little, she hit him with the whip, he shied again, thereby losing a second or two of time, then went on, and the wagon was struck on the rim of the hind wheel just as the rig was passing off the tracks on the opposite side from which she approached. The wagon was overturned and demolished, one lad was killed, the other boy and Mrs. Flannelly injured.

THIRTEENTH.

The question of the negligence of the defendant in approaching the crossing under the circumstances without giving warning was duly submitted to the jury and the defendant was found guilty of failure to give due

warning of the train's approach. The correctness of the submission of this feature of the case and of the finding by the jury is fully and unreservedly conceded by the defendant on appeal.

FOURTEENTH.

The only contention raised by the defendant on appeal was upon the question of contributory negligence of plaintiff, Mary, in driving upon the track.

FIFTEENTH.

Said question of contributory negligence in thus driving upon the track was submitted to the jury, the trial judge charging the jury that if the plaintiff drove forward behind a receding train before she had made a proper observation or taken a position to see what was coming, she took the risk, and plaintiff could not recover, even if defendant was negligent.

SIXTEENTH.

The jury found in favor of the plaintiff, Mary, in the sum of $2000, and John in the sum of $500, and that defendant company was negligent in failing to sound the blast of a whistle at the proper place and at the proper time at the crossing.

SEVENTEENTH.

The defendant moved for judgment *non obstante veredicto*. The Court overruled the motion. In so doing the Judge said: "The right to judgment notwithstanding the verdict depends upon whether the plaintiff was clearly convicted of contributory negligence on the undisputed evidence. It is said she was, by her own testimony, that she drove right on to the track where she was injured as soon as the train which was passing on the track beyond had cleared the crossing, without waiting until she got an unobstructed view in the direction from which the train that struck her was coming,

it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this case be, and the same is hereby reversed with costs. George Gray, Circuit Judge, Philadelphia, May 24th, 1909."

A certified copy of the entire record of the said case and the opinion in the said Circuit Court of Appeals is hereto annexed, marked Exhibit "A".

TWENTY-SECOND.

Yours petitioners are advised that the said Judgment of the said United States Circuit Court of Appeals in the said case is erroneous, and that the same persents an instance where it is proper and just that this Honorable Court require the said case to be certified to it for review and determination under and in conformity with the provisions of the sixth section of the Act of Congress establishing Circuit Courts of Appeal, approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said Act.

TWENTY-THIRD.

At the trial in the Circuit Court the question of contributory negligence was submitted to the jury. The testimony regarding the situation was conflicting. The circumstances were not fixed but shifting. The question whether she was negligent under the circumstances was therefore one of fact.

The jury found for plaintiffs, thus determining upon the evidence the fact that the plaintiff, Mary, had not been guilty of contributory negligence.

A motion by defendant for judgment notwithstanding the verdict was overruled by the Court on the ground that the jury had found that fact in favor of the plaintiff.

TWENTY-FOURTH.

The Circuit Court of Appeals were without jurisdiction to re-try this question of fact as to an alleged act of contributory negligence on the part of the plaintiff.

Mary. Such taking of jurisdiction was in violation of the Seventh Article of the Amendments to the Constitution of the United States which declares that "In suits at common law * * * no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

An order denying a motion for judgment *non obstante veredicto* is final according to the rule of the common law and no writ of error lies thereto.

A motion by defendant for judgment *non obstante veredicto* is unknown to the common law.

Your petitioners respectfully represent that the action of the Circuit Court of the United States in granting this writ of error involves an important point of practice that should be settled beyond controversy by the decision of this Honorable Court.

TWENTY-FIFTH.

The record presents a further question warranting the granting the prayer of this petition for the issuance of a writ of *certiorari*. The assignments of error show that the sole question raised was whether or not the plaintiff, Mary, in driving upon the track was herself negligent and so contributed to the infliction of the injury complained of. The trial judge treated this question as a question of fact and not a question of law. The jury found that the plaintiff, Mary, was free from negligence, and the Court refused to disturb the verdict. It thus appears that uncontradicted evidence did not prove negligence on the part of the plaintiff, and the question under the rulings of this Honorable Court could not be treated as a question of law. The Circuit Court of Appeals in this regard has departed from the rulings of this Court as well as from prior rulings of Circuit Courts of Appeals in such cases. It is important that the rulings of the several Circuit Courts of Appeals should be uniform, and in conformity with the rule laid down by this Court.

TWENTY-SIXTH.

Your petitioner submits that in this constantly recurring class of cases the law should be settled beyond the possibility of any departing therefrom in the trial Courts of the United States.

Wherefore your petitioners pray that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case therein entitled the "Delaware and Hudson Company, Plaintiff in Error vs. John Flannelly and Mary E. Flannelly, Defendants in Error, No. 29 March Term, 1909," together with a full transcript of the record therein, that it may be reviewed and determined by this Court as provided in section six of the said Act of Congress of March 3, 1891, and that your Honorable Court will reverse the judgment of said Circuit Court of Appeals, with costs, and for such other and further relief as to this Court may seem appropriate.

JOHN FLANNELLEY [SEAL]

MARY E. FLANNELLY [SEAL]

FRANK W. HACKETT,
Of Counsel for Petitioners.

STATE OF PENNSYLVANIA, }
COUNTY OF LUZERNE, } ss.:

Personally before me appeared Paul J. Sherwood who, being duly sworn according to law, deposes and says: That he is counsel for the above named petitioners, John

Flannelly and Mary E. Flannelly. That as such counsel he brought the suit referred to in said petition, and tried the same for plaintiffs in the Circuit Court of the United States and argued the same in the United States Circuit Court of Appeals. That he knows the contents of above petition, and that the facts therein set forth are true and correct, and in his opinion said petition is well founded in law. That he has authority from said petitioners to sign their names thereto.

PAUL J. SHERWOOD.

Sworn and subscribed before me
this 24th day of August, 1909.

MARTIN FREY,
Alderman and ex-officio J. P.
Commission expires first Monday in May, 1911.

[Clerk's certificate]

JOHN FLANNELLY AND MARY E. FLANNELLY, *Petitioners,*	*In the Supreme Court of the United States.*
vs.	No.....
THE DELAWARE AND HUDSON COMPANY, *Respondent.*	

MOTION FOR WRIT OF *CERTIORARI.*

Now, 11th day of October, 1909, come John Flannelly and Mary E. Flannelly by their counsel, Frank W. Hackett, and move this Honorable Court that it shall, by a writ of *certiorari* directed to the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit, require said Judges of said Court to cause to be certified to this Court for review and determination, a certain cause in said Court of Appeals lately pending wherein said John Flannelly and Mary E. Flannelly were defendants in error and said Delaware and Hudson Company was plaintiff in error, numbered in said Court No. 29 March Term, 1909, and to that end they now tender herewith their petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

FRANK W. HACKETT,
Counsel for Petitioners.

JOHN FLANNELLY AND MARY E. FLANNELLY,
Petitioners,

vs.

THE DELAWARE AND HUDSON COMPANY,
Respondent.

In the Supreme Court of the United States,

No.....

NOTICE OF APPLICATION TO SUPREME COURT OF THE UNITED STATES FOR WRIT OF *CERTIORARI.*

To the Delaware and Hudson Company, Respondent, and James H. Torrey, its attorney:

You, and each of you, are hereby notified that the above named petitioners will, on Monday, the 11th day of October, 1909, at 12 o'clock M., upon the coming in of the Supreme Court of the United States, upon their verified petition and copy of the entire record in this case, submit to the Supreme Court of the United States, in its court room, in the Capitol, in the City of Washington, D. C., their motion and petition for an order granting a writ of *certiorari* in the above entitled case, directed to the United States Circuit Court of Appeals for the Third Circuit, requiring said Court to certify to said Supreme Court of the United States the entire record in the case wherein said John Flannelly and Mary E. Flannelly were defendants in error and said Delaware and Hudson Company was plaintiff in error, numbered in said Court No. 29, March Term, 1909, lately pending in said Court of Appeals, a copy of which motion and of the petition for writ of *certiorari* and of the brief of counsel in support thereof are herewith delivered to you.

FRANK W. HACKETT,
Washington, D. C.,
Counsel for Petitioners.

STATE OF PENNSYLVANIA, }
COUNTY OF LUZERNE, } ss.:

Personally before me appeared Paul J. Sherwood who, being duly sworn according to law, deposes and says: That he served a copy of the above motion and of the petition for writ of *certiorari* and of the brief of counsel in support thereof on the above named respondent and said counsel personally, on the 14th day of Sept. 1909.

Sworn and subscribed before me this 15 day of Sept. 1909.

Robert Wain
Notary Public

L.S.

Service is hereby acknowledged on part of Respondents and their counsel this 14th day of Sept. 1909.

James A. Torrey
Ulan Torrey

Counsel for Respondent.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1909.

Office Supreme Court
FILED
SEP 24
JAMES H. McKENNEY

JOHN FLANNELLY AND MARY EILEEN FLANNELLY,
Petitioners,
vs.
THE DELAWARE AND HUDSON COMPANY,
Respondent.

No. 607

UPON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF COUNSEL FOR PETITIONERS

FRANK W. HACKETT,
Washington, D. C.
PAUL J. SHERWOOD,
Wilkes-Barre, Pa.
Counsel for Petitioners

Supreme Court of the United States.

JOHN FLANNELLY AND MARY ELLEN FLANNELLY,
Petitioners,
vs.
THE DELAWARE AND HUDSON COMPANY,
Respondent.

OCTOBER TERM, 1909.
No. 605

UPON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONERS' BRIEF.

We respectfully ask that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Third Circuit, for the reason that said Court—

1. Had no jurisdiction to proceed upon the writ of error taken to the Circuit Court of the United States for the Middle District of Pennsylvania—there being no question of law for said Court of Appeals to review.

2. Re-examined a fact tried by a jury, to wit, the question of the alleged contributory negligence of plaintiff, Mary Flannelly, otherwise than according to the rules of the common law.

3. Did not follow the rulings of this Court, and treat the question of contributory negligence as a question of fact for the jury.

STATEMENT OF FACTS.

Action against a railroad company for injuries received by negligent operation of freight train and negligently running a passenger train across a public highway in Dupont, Luzerne County, Pennsylvania, 30 July, 1907, demolishing wagon in which plaintiff, Mary, with due care was driving over such highway. Plaintiff, John, sued for damages to horse and harness, for value of wagon, expenses incurred for his wife and loss of services. Plaintiff, Mary, sued for injuries to person.

Plea, "not guilty."

Tried by jury who rendered, March 26, 1908, verdict for plaintiff as follows:

"Mary Flannelly, in the sum of $2000 and in favor of John Flannelly, in the sum of $500. Defendant company was negligent in failing to sound the blast of a whistle at the proper place and at the proper time at the crossing of the defendant where the plaintiff, Mary Flannelly, received her injuries." (Rec., 2.)

On 27 March, 1908, defendant's attorneys moved for "judgment *non obstante veredicto* upon the whole record, particularly upon the refusal of the request of the defendant contained in its first four points for charge for binding instructions to the jury in favor of the defendant." (Rec., 36.)

On September 30th, the Court discharged the rule for judgment for defendant *non obstante veredicto*, saying in part:

"The right to judgment, notwithstanding the verdict, depends therefore on whether the plaintiff was clearly convicted of contributory negligence on the undisputed evidence. It is said that she was, by her own testimony, that she drove right on to the track where she was injured as soon as the train which was passing on the track beyond had cleared the crossing, without waiting until

she got an unobstructed view in the direction from which the train that struck her was coming, the view being obscured by a curve in the track, and the passing train being made up of high box-cars. I confess that this was the impression I got at the trial and I charged the jury accordingly. But upon going over the stenographer's notes I find that I was mistaken, or at least it was not so clear, that I would have been justified in taking the case from the jury and directing a verdict, and if so I cannot now enter judgment notwithstanding it. The evidence of course was for the jury, unless so completely one way that there could be but one conclusion to be drawn from it. And the rule with regard to contributory negligence having been fully explained to them, it must be assumed that they properly applied it and found that the plaintiff did not drive on to the tracks until she had waited a suitable time so as to have a sufficient view and be able to make such an observation, as was required of her before doing so. Besides that it is uncontradicted evidence that the horse stopped or balked just as he got upon the track, without which the plaintiff would have got safely over, the train as it was merely striking the hind wheel of the wagon. It was thus the unexpected action of the animal which really brought about the accident, the plaintiff having apparently started in sufficient time to get across if this had not happened, the train, according to her statement, not having yet come in sight. If, therefore, she was not negligent in starting to cross as the jury in this view of the evidence might properly find, there was nothing to stand in the way of a recovery." (Rec., 37–38.)

There was a motion for a new trial upon the ground of after discovered evidence, but no appeal was taken from the order discharging the rule for the same, but only from the order discharging the rule for judgment *non obstante veredicto*. (Rec., 437.)

Writ of error was allowed January 4, 1908.

The assignments of error six in number are to be found at pages 41–2 of the record. The first four are in general terms with regard to what the evidence does or does not warrant. The fifth and sixth are that the Court erred in not granting the motion of defendant for judgment notwithstanding verdict. No bill of exceptions is signed.

The only question presented on the writ of error, therefore, was, whether the Court was right in refusing to enter judgment for the defendant.

The Circuit Court of Appeals (Bradford, J.,) reversed the judgment below with costs: "There was nothing in the case to warrant a verdict based upon an absence of all contributory negligence, and as there was nothing to warrant such a verdict, the motion for judment *non obstante veredicto* should have been granted." (Rec.)

The Circuit Court of Appeals treat the record as presenting a question of contributory negligence. They go over the testimony in detail and reach the conclusion that the plaintiff, Mary's "uncontradicted statements disclose contributory negligence on her part."

POINTS OF LAW.

I.

THE MOTION BY DEFENDANT FOR JUDGMENT *NON OBSTANTE VEREDICTO* WAS A MOTION NOT KNOWN TO THE COURTS OF THE UNITED STATES; AND THE COURT OF APPEALS HAD NO RIGHT TO CONSIDER IT ON THE WRIT OF ERROR.

At common law a motion by a defendant for judgment *non obstante veredicto* was never allowed. Freeman on Judgments, sec. 7. *Smith v. Powers*, 15 N. H., 546. Bouvier's Law Dictionary Title *Non Obstante Veredicto*, vol. ii., p. 508, and cases cited.

If the verdict be for the defendant, the plaintiff, in some cases, *moves for judgment non obstante veredicto;* that is, that judgment be given in his own favor *without regard to the verdict* obtained by the defendant. The motion is made in cases where, after a pleading by the defendant in confession and avoidance, as, for example, a plea in bar, and issue joined thereon, and verdict found for the defendant, the plaintiff, on retrospective examination of the record, conceives that such plea was bad in substance, and might have been made the subject of demurrer on that ground. If the plea was itself substantially bad in law, of course the verdict, which merely shows it to be true in point of fact, cannot avail to entitle the defendant to judgment; while on the other hand, the plea being in confession and avoidance involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action.

In such case, therefore, the court will give judgment for the plaintiff *without regard to the verdict;* and this for the reason above explained, is also called a judgment *as upon confession*. Sometimes it may be expedient for the plaintiff to move *non obstante*, &c., even though the verdict be *in his own favor:* for if in such a case, as above

described, he takes judgment as *upon the verdict*, it seems that such judgment would be erroneous, and that the only safe course is to take it *as upon confession*. *Stephen on Pleading*, 97–8.

A writer in *The American Law Review* (vol. 14, p. 499,) attempts to show that a defendant ought to have the right to move for judgment notwithstanding verdict. After an examination of all the cases, he says: "We must, therefore, admit that the point we contend for is without the sanction of a single decision made directly on the point."

The Circuit Court of Appeals for the Eighth Circuit, has held that no such right exists in favor of the defendant. *German Insurance Company v. Frederick*, 7 U. S., App., 122, 126.

The Circuit Court in the case at bar was sitting in Pennsylvania. It seems that in the Courts of that State a practice has prevailed of reserving a point of law, and the defendant, after verdict against him, is permitted to move for judgment *non obstante veredicto*, and also for judgment upon the point reserved.

"It has been said that in Pennsylvania, where a point of law is reserved at the trial, the jury is instructed to find for the plaintiff, whereupon the defendant moves for judgment on the point reserved *non obstante veredicto*. See 2 Brewster's Prac., 1219. And in some other states the technical common law rule that this form of judgment should not be given for the defendant has not been observed; though it would seem that this change of practice is due, in some degree, to the confusion of this subject with judgment on special verdicts and points reserved, and to the fact that judgments are frequently entered under the name *non obstante veredicto* which properly and technically would not be such if the common law distinctions were carefully observed." *Bouvier's Law Dictionary*, (Ed. 1897) vol. ii., p. 508.

The act of Congress, June 1, 1872, (17 Stat. 197) declares, "that the practice, pleadings, and forms and modes of proceeding, in civil causes, other than Equity and Admiralty causes, in the circuit and district courts,

shall conform as near as may be" to the same things "existing at the time in the Courts of record of the State within which such circuit and district courts are held."

In a case that went up on exceptions from the Circuit Court for the Eastern District of Pennsylvania, in 1890, the trial judge had ordered a nonsuit, because in his opinion the evidence was insufficient to maintain the action. The Supreme Court of the United States had repeatedly held that a Court of the United States would not order a nonsuit without the plaintiff's acquiescence. Counsel made no point of this in argument, but the Court *sua sponte* (GRAY, J.,) examined the subject, and concluded that under the statute of 1872, the Circuit Court in Pennsylvania could order a nonsuit in conformity with the practice authorized by the State Statute. *Central Transp. Co. v. Pullman*, 139 U. S., 40. SHIRAS, J., in *Coughran v. Bigelow*, 164 U. S., 308, said that it is the clear implication of the *Pullman* case that granting a nonsuit for want of sufficient evidence is not an infringement of the constitutional right of trial by jury.

This decision proceeded on the ground that it really makes no difference how a defendant presents the defence that plaintiff upon his own case shows no cause of action. The question is one of practice to which the Act of 1872 applies. But the decision does not reach to the case at bar. In the other cases there was no trial by jury—the Court having decided as a question of law, that plaintiff upon his own evidence could not recover.

When a trial judge has decided that there is a case for the jury and a verdict has been rendered, a different situation is presented from that where a non-suit has been ordered on plaintiff's evidence. A motion for a new trial, though a state court sanctions the practice, cannot be reviewed in the federal court. It is not within the Act of 1872. *Indianapolis R. R. v. Horst*, 93 U. S., 301. Nor can a motion in arrest of judgment be reviewed. *Street Railroad v. Hart*, 114 U. S., 660. It "had no

more effect than a motion for a new trial, and therefore under our settled practice, cannot be reviewed here, on writ of error, although there is a bill of exceptions with regard to it." Per BLATCHFORD, J., p. 661.

A motion for a new trial, or a motion in arrest of judgment, is a motion well known to the common law, and can of course be made before the trial judge, to be disposed of according to his discretion. But a motion made by a defendant for a judgment in his favor after verdict rendered against him is, we submit, not a motion that could have been contemplated by the Act of 1872. We believe, if it were necessary to decide the point, that this Court would be of opinion that a motion of this character does not find a place in the practice of the federal courts.

It is sufficient, however, for us to maintain that an order overruling such a motion cannot be reviewed in the courts of the United States, upon a writ of error. The analogy between such a motion, and one for a new trial, is obvious. If the latter may be not a subject of review, all the more ought the former to be withdrawn from the jurisdiction of an appellate court; since the effect of the latter when granted is only to set aside the verdict while that of the former is to conclude the litigation by awarding judgment to the party who has lost his case before the jury. We think it to be the correct practice, therefore, that no writ of error should have been allowed.

But, before passing from a consideration of this point, it is proper that we should explain that the practice in Pennsylvania does not countenance the results that have followed the motion for judgment notwithstanding verdict in the case at bar. Though the motion as allowed in Pennsylvania presents a feature in practice that is properly viewed as a novelty in common law courts, the real purpose of the motion is to expedite trials, without departing from the principles that support a trial by jury, and the integrity of a verdict.

The Chief Justice (MITCHELL), in a recent decision, refers to the statutes from 1823 down to and including a statute of 1905, that have aimed to improve the practice and hasten decisions. He disavows any purpose on the part of the legislature to make "radical innovations on the settled law between the powers of the Court and jury." He points out that "the statute of 1905 shows no intention to infringe, even if it could constitutionally do so, the province of the jury to pass upon the credibility of witnesses and the weight of oral testimony." * * * "If it should appear that there was conflict of evidence on a material fact, or any reason why there could not have been a binding direction then [i. e. at trial,] there can be no judgment against the verdict now." *Dalmas v. Kemble*, 215 Pa. St., 411, 413. (1906).

The title of the Act of April 22, 1905, is as follows:

"An Act authorizing the Courts of this Commonwealth to certify the evidence and enter judgment upon the whole record, whenever a request for binding instructions has been reserved or declined by the trial judge; and authorizing appeals from the judgment so entered and the entry of the proper judgment in the Supreme or Superior Court."

To illustrate with what scrupulous care the Courts of Pennsylvania adhere to settled principles in preserving to a plaintiff the right to his verdict where the attempt is made by the defendant to obtain a review of the facts, under cover of a motion for verdict *non obstante veredicto*, we may cite the recent decision of the Superior Court in *Ackley v. Bradford Township*, 32 Pa. Supr. Ct., 487. The action was for negligence against the township for a defect of the highway. A two-strand fence wire had been stretched across the road, about six years before the accident, by the owner of an oil well, for a guy to a structure on one side, and fastened to a tree opposite. It was 12 to 13 feet above the surface of the highway.

Plaintiff had passed along under this wire four times a day for four or six weeks, and had not noticed it. He was engaged in hauling wood on a bob sled, with a flared rack six or seven feet high. There was a foot or two feet of snow on the ground. Plaintiff, to go back and look at the fastenings of his load, had tied the lines, and climbed over the top; on his way back, he was struck by the wire and injured. Defendant had reserved a point that under all the evidence plaintiff could not recover. Plaintiff had a verdict. The trial judge on defendant's motion gave judgment for the defendant.

The appellate court overruled the judgment, saying of some of the arguments of the trial judge that they would have been of force before the jury, but could not properly be urged as a reason for disturbing the verdict.

"In the opinion filed in support of the judgment *non obstante* the learned trial judge makes a critical analysis of the testimony and reaches the conclusion that the wire was not such an obstruction as the supervisors were bound to take notice of, and that the plaintiff was guilty of contributory negligence, both of which questions necessarily depended upon disputed questions of fact and the inferences to be drawn from them. While we might agree with the result reached by the judge, it is not within our province, nor was it his to do so." * * * "Such matters are properly referred to the common-sense judgment of the jurors rather than be resolved as legal propositions."

As respects contributory negligence, this decision will be seen to be directly in point.

II.

IF THE CIRCUIT COURT OF APPEALS HAD JURISDICTION TO CONSIDER THE MOTION FOR JUDGMENT *NON OBSTANTE VERE-DICTO*, IT COULD NOT RE-EXAMINE THE FACT FOUND BY THE JURY THAT PLAINTIFF, MARY, WAS FREE FROM CONTRIBUTORY NEGLIGENCE.

The suit was as action in trespass to recover damages for personal injuries—a suit at common law.

The sole fact re-examined by said Court of Appeals was that of the alleged contributory negligence of the plaintiff, Mary Flannelly, in attempting to cross the defendant's tracks.

Contributory negligence did not hinge upon the violation of any rule which would constitute negligence *per se*, but depended upon the finding of fact whether the alleged careless plaintiff had used "due care under all the circumstances" in driving forward and making the effort to cross the defendant's tracks. It was to be found by a consideration of oral evidence, varied as the witnesses were numerous, and from circumstances testified to, together with the inferences drawn therefrom. It was a question based upon shifting facts and circumstances, and peculiarly within the province of a jury to determine.

The question was submitted by a trial judge to a jury, in a charge fully as favorable to the defendant as the law permits. The Court in an opinion refusing judgment *non obstante veredicto*, says:

"The rule with regard to contributory negligence having been fully explained to them (the jury) it must be assumed that they properly applied it and found that plaintiff did not drive on the tracks until she had waited

a suitable time so as to have a sufficient view and be able to make such an observation as was required of her before doing so."

The Appellate Court entered into a consideration of the inferences and deductions of this oral evidence, and without anything appearing which is negligence *per se*, with the whole question of care shifting with the circumstances, balanced the probabilities, weighed the evidence, re-examined the facts, and after thus usurping the province of jury, found the facts to be directly contrary to the finding of the jury.

Clearly the Circuit Court of Appeals acted without jurisdiction in so doing.

The Circuit Court of Appeals re-examined the fact of the conduct of the plaintiff Mary in driving across the tracks. They did this in order to reach a conclusion in respect to the allegation of negligence on her part set up by the defendant. They went over the same ground that the jury had gone over before them. The only justification for thus reviewing the testimony is to be found in a motion made by the defendant after verdict for judgment notwithstanding the verdict. The procedure was not according to the rules of the common law—no such motion ever having been allowed at common law.

"'No fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' This is a prohibition to the Courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings." *Per* STORY, J., *Parsons v. Bedford et al.* (1830,) 3 Pet., 448.

See also remarks of HARLAN, J., *Railroad Co. v. Fraloff*, 100 U. S., 31.

We are aware of no instance in common law practice where, in the absence of a bill of exceptions, an Appellate Court of the United States has properly had before it the entire testimony, and re-viewed the same, with the result of reversing the verdict of the jury. Such a procedure is precisely what the seventh amendment was designed to prevent.

"In some of the states a writ of error is authorized to bring up for review the proceedings and judgment of the inferior court, on which it may be assigned as an error in law, upon a bill of exceptions setting forth the whole evidence, that the court below erred in not granting a new trial because the verdict was against the evidence. Such a practice in the appellate court of the United States is perhaps forbidden by the Seventh Amendment to the Constitution of the United States, declaring that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." *Per* MATTHEWS, J., *Metropolitan R. R. Co. v. Moore*, (1886) 121 U. S., 573.

The decision in *Parsons v. Bedford* is much in point. Like the case at bar there had been no bill of exceptions allowed.

"It was competent for the original defendant to have raised any points of law growing out of the evidence at the trial, by a proper application to the court, and to have brought any error of the court in its instruction or refusal, by a bill of exceptions, before this court for re-view. Nothing of this kind was done or proposed. No bill of exceptions was tendered to the court, and no points of law are brought under review. The whole object, therefore, of the application to record the evidence, so far at least as this court can take cognizance of it, was to present the evidence here in order to establish the error of the verdict in matters of fact. Could such matters be properly cognizable in this court upon the present writ of error? It is very certain that they could not upon any suit and proceedings in any court of the United States, sitting in any other State of the Union than Louisiana." Page 445.

A writ of error removes nothing for re-examination but questions of law arising upon the record. A defendant in the Circuit Court may at the close of the plaintiff's case move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant the jury in finding a verdict in his favor. It is held that such a motion is not one addressed to the discretion of the court, but that it presents a question of law, and that it is as much the subject of exceptions as any other ruling of the court in the conduct of the trial. *Insurance Company v. Folsom*, 18 Wall., 250. But no such course was adopted in the case at bar. No exception was before the Circuit Court of Appeals.

III.

THE CIRCUIT COURT OF APPEALS DID NOT CONFORM TO THE RULINGS OF THIS COURT IN REGARD TO CONTRIBUTORY NEGLIGENCE. IT TREATED THE QUESTION AS ONE OF LAW. IT SHOULD HAVE TREATED IT AS A QUESTION OF FACT.

The action of the Circuit Court of Appeals in taking jurisdiction and proceeding to examine the record is to be accounted for only upon the theory that it considered the question of contributory negligence to be a question of law. The opinion deals with the inquiry, "Did or not contributory negligence on the part of the plaintiff so clearly appear that the court below was bound to render judgment for the defendant *non obstante veredicto?*" It then proceeded through four or five pages to take up in detail the testimony, quoting it extensively *verbatim*. The court, going over the ground, already travelled by a jury under court instructions from the trial judge upon the point of contributory negligence—at length expresses the opinion that "the fatal error she committed was in leaving the 'usual place' and getting on the tracks before she had an unobstructed view." The court says: "Her uncontradicted statements disclose contributory negligence on her part."

We say that the court is mistaken and that the jury and the trial judge are right. The plaintiff, Mary Flannelly, was not chargeable with negligence *per se*.

From one point of view it is hardly admissible for us here to argue the question of fact in respect to Mrs. Flannelly's conduct, but it is necessary that the substance of the evidence on this point be brought to the

attention of this court, that it may clearly appear that the Circuit Court of Appeals did not follow the rulings of this court in respect to submitting to the jury the question of contributory negligence on the part of the plaintiff. She had with her her young son and another small boy, and she used the care and circumspection that would be expected of a mother in such a situation.

We quote from Mr. Justice Bradford's opinion:

"There is evidence in the case to the effect that Mrs. Flannelly on the morning of July 30, 1907, was driving a horse attached to a light lumber wagon, in which she and two small boys were riding, on her way from her home in Pittston township, Luzerne County, Pennsylvania, to the city of Pittston, about five miles distant, that to reach her destination she proceeded on a public highway, which ran through the village of Dupont or Smithville; that in pursuing this route it was necessary to cross at grade the railway tracks of the defendant from east to west and, in approaching those tracks, to cross at grade the double tracks of the Lehigh Valley railroad 'cut-off' distant from the defendant's tracks several hundred feet; that the defendant's tracks were three in number and at the crossing parallel to each other and running in a generally northerly and southerly direction; that on the westerly side of the defendant's tracks and in close proximity to them there was a switch or branch track of the Lehigh Valley railroad extending to a coal breaker about half a mile south of the crossing; that between the Lehigh Valley railroad 'cut-off' and the defendant's tracks and at the distance of between 20 and 50 feet from the latter there was a place where persons, driving such a conveyance as that occupied by Mrs. Flannelly, usually stopped to look and listen before undertaking to cross the defendant's tracks; that Mrs. Flannelly after crossing the 'cut-off' stopped at the usual place, she then being from 40 to 50 feet from the defendant's tracks, and looked and listened for approaching trains before undertaking to cross those tracks; that when she reached that place she saw a long freight train of high box-cars coming round a curve in the track from the north on its way southwardly towards Pittston; that it was moving slowly and she waited for it to pass; that

it passed over the crossing on the track of the defendant nearest to her; that while thus waiting two trains, one moving north and the other south, passed behind her on the tracks of the Lehigh Valley railroad 'cut-off' and still another train passed to the north over the crossing on the switch or branch track of the Lehigh Valley railroad which was the fourth track from her; that she did not see any train passing on the third or westerly track of the defendant; that after the freight train on the first or nearest track had moved to the south and cleared the crossing some distance and she had looked and listened in vain for an approaching train or a danger signal, she drove to and upon the first track so far that the head and front feet of the horse were on the second track, and there again stopped and looked and listened without seeing or hearing any approaching train; that she then drove on until the horse was over the middle of the second track when she first saw the train, the locomotive of which struck the wagon; that at this juncture the horse reared and pranced and delayed her several seconds notwithstanding her application of the whip to him several times; and that she drove across the second track but not far enough to clear the locomotive which struck the hind wheel of the wagon throwing its occupants out. Whether Mrs. Flannelly was delayed on the second track by unmanageable behavior on the part of the horse she was driving was a question for the jury. It is to be assumed that the jury believed she was. Had it not been for that delay the accident undoubtedly would not have happened. * * * There is uncontradicted testimony to the effect that while Mrs. Flannelly was accustomed to driving horses, the horse driven by her at the time of the accident was 'kinder skittish sometimes.' * * * There is testimony to the effect that the train which struck the wagon was a fast passenger express known as the 'Flyer'; that it was behind time; and that it was moving at a high rate of speed as it came northwardly round the curve to the south of the crossing and while approaching the point of collision * * * that the train coming up the second track at the rate of 50 or 60 miles an hour would cover from 75 to 88 feet each second."

It thus appears that Mrs. Flannelly did what is usual and customary. She stopped at the usual and customary

place and looked and listened. It appears that she made a second stop and looked where she could see at least 300 feet; that she was giving attention to her situation, which was alarming,—five trains or more surrounding her, her horse skittish, frightened by the trains, and so misbehaving that he caused a delay, but for which the hind wheel of the wagon would not have been caught. She had to decide instantly. It is apparent that the accident happened as she was driving off,—not upon the tracks. It is conceded that the crossing was exceedingly dangerous, with no safety signals or watchman. The train that hit her was the fastest express on defendant's road, behind time, running down grade, making a mile a minute, and failed to give any notice of its approach, but bore down upon her, when the noise of other trains was such it could not be heard, and the possibility of seeing for a very long distance down the tracks was interfered with by defendant's other trains.

It is apparent that the crucial reason upon which the reversal of the judgment in favor of plaintiffs is based, is that Mrs. Flannelly should have waited for the train on the track nearest her to have receded far enough from the crossing to have allowed her a more extended view of the tracks in the direction from which the train that damaged her came.

The court says:

"Here then was a woman of maturity, of sound mind, familiar with the crossing, knowing that from the usual stopping place she could see, in the absence of any obstruction, a train approaching from the south as far away as the viaduct or even further, who waited until the train of box-cars shut off her view to the south, and did not wait, notwithstanding the manifest danger of such an omission, until the defendant's tracks were sufficiently clear to enable her to cross in safety. * * * She failed to observe due care not only in undertaking to cross the tracks before she had an unobstructed view of them to the south, but in starting as she did from her first stop on the tracks when

she was behind the rear end of the *receding* train of box-cars."

We submit that the court here misapprehended the evidence. The train that pulled in on the nearest track to her was, according to the weight of testimony, *not receding*.

William White (Rec. 112) testified that cars were *standing* on the fourth track from him—the first track to Mrs. Flannelly.

"Q. There were no cars standing on the fourth track at the time you went over first? A. Yes, sir, there was.

"Q. You are very positive about that? A. Sure.

"Q. How far were they below the crossing? A. I could not say how far—they were above the crossing. They were beyond the shanty that was there, and they have since moved that shanty—they have made a different change."

Mrs. Aherns testified that there was a train of high coal cars *standing* at that point—that the head end of it was about at the second red house.

Wm. Strubeck was riding on the caboose of the Lehigh Valley train. He witnessed the accident. He testified that a coal train was *standing* on the switch track about 150 to 200 feet from the crossing—"the first track to this woman."

It will thus be seen that the Appellate Court either misapprehended or failed to observe at least a part of the evidence and is mistaken when it says (opinion, page). "On her own showing, *uncontradicted in the case*, she failed to observe due care not only in undertaking to cross the tracks before she had an unobstructed view of them to the south, but in starting as she did from her first stop on the tracks when she was behind the rear end of the *receding* train of box cars."

The facts in the case at bar were in dispute. It was for the jury to decide whether or not the plaintiff was guilty of contributory negligence.

Where the defense of contributory negligence is set up, the plaintiff is entitled to have the question submitted to the jury unless no recovery could be had upon any view which could be properly taken of facts which the evidence tended to establish.

Dunlap v. Northeastern R. R. Co., 130 U. S., 649.

"In determining whether an employe has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might be reasonably expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion." *Per* HARLAN, J., *Kane v. Northern Cent. R. R. Co.*, 128 U. S., 95.

This language is fully as applicable to a traveller upon the highway who is injured by the negligence of a railroad company.

The right of a train over a traveller to precedence on a highway at a crossing, is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of its approach. A traveller has a right to expect that this duty be performed, and he can act on such belief without imputation of negligence. It is then for a jury to say whether he exercised care according to the circumstances.

Cont. Imp. Co. v. Stead, 95 U. S., 161.

See, also, *Jones v. R. R. Co.*, 128 U. S., 443.

A person approaching a highway crossing is not bound to anticipate negligence. "The question whether his attempt (to cross) was one which an ordinarily prudent person would not have made was a question upon which fair-minded men might differ. * * * When different inferences may fairly be drawn from the facts, and different minds may be led reasonably to different conclusions upon the evidence, it is error to take the question of negligence from the jury."

Farrell v. R. R. Co., 138 Fed. Rep., 28;

Union R. R. Co. v. Tate, 151 Fed. Rep., 550;
Chunn v. R. R. Co., 207 U. S., 302 (305);
Wash. & Georgetown R. R. Co. v. McDade, 135 U. S., 554.

There cannot be the slightest doubt here that it was the duty of the trial judge to leave this question to the determination of the jury. This was done in a charge that clearly defined the duty of the jury. The jury decided the question, after having viewed the *locus in quo*, and having heard the witnesses on both sides give their testimony.

We append a portion of the charge of the trial justice which deals with the question of contributory negligence: Speaking of Mrs. Flannelly, the plaintiff, His Honor said:

"The criticism of her, and the charge of negligence which is made against her, which it is claimed prevents her recovery here is, that she crossed before she had a clear view in the direction in which this train was coming * * * before she had a view that really amounted to anything that showed her what was beyond, that showed her whether she could safely venture on the track, she ventured on, and the accident happened. If she went forward in that way, before she had made a proper observation, or taken a position to see what was coming, she took the risk, and the fault is her own; even though the company were negligent she could not hold them because her negligence would be such that it bar a recovery. It is useless for a person to say that they took care or to endeavor to persuade a jury that they did, if they drove on to a railroad track without looking, without listening, without using the senses which we are given for our own protection. We know that trains run fast, and that a few hundred feet observation is of no practical use or advantage, and if that is all the far we can see when we drive on to a track, we cannot recover in a court of justice. This woman was bound to have a view that would amount to something, far enough so that she could see what was coming, and if she ventured across without that she is convicted of negligence, and your verdict should be for the

defendant. You must decide then, first, that the defendant company failed to exercise the care that they should have exercised upon that occasion, and that the injury resulted from that; and, second, that Mrs. Flannelly, was free from contributory negligence, or negligence on her part, or you cannot find in her favor." (Rec., 28–30.)

"Courts do not approach the question as an original one and consider whether, in their judgment, the testimony does or does not prove negligence, but accept the determination of the jury if there is any evidence upon which it can be rested." *Per* MOODY, J. *Davidson Steamship Co. v. U. S.*, 205 U. S., 191.

The only possible ground we can imagine for the defendant to stand upon in support of its charge of negligence against Mrs. Flannelly is, that the distance down the track was not sufficiently extended for her to guard herself by looking. But the question of such distance is peculiarly a matter for the jury, who had visited the crossing and who could therefore see for themselves whether under all the circumstances the plaintiff had acted with due care.

A case that much resembles the case at bar is *Delaware etc. R. R. v. Converse*, 139 U. S., 469. The trial judge there told the jury that "it was the plaintiff's duty especially in view of the dangerous character of the crossing to stop, look up and down the road, and listen for trains * * * that the *jury must judge of the plaintiff's opportunity of seeing whether standing cars were in the way*, and if they were, whether he could have seen over them by standing up in his carriage, that if he could, he should have stood up, that of all this the jury must judge; and if they found from the evidence that plaintiff was guilty of such negligence he could not recover." (Pages, 475–6.)

Evidently an exception had been taken by the defendant railroad company, to this part of the charge, for the court, (HARLAN, J.,) says:

"The next question is as to the instructions relating to the alleged contributory negligence on the part of the plaintiff." (Page 474.)

The court found that the defendant was not prejudiced by these instructions.

"The jury have found that the plaintiff was not guilty of contributory negligence. That question was properly submitted to them upon all the evidence, which was contradictory, and as no error in law, in reference thereto, was committed to the prejudice of the defendant, we have no authority to reverse their finding in that respect." *Parsons v. Bedford*, 3 Pet., 433, 447. *Railroad Co. v. Fraloff*, 100 U. S., 24, 31.

We submit, therefore, that the Circuit Court of Appeals have disregarded the settled rule, and have treated as a question of law a situation where the evidence was contradictory in respect to plaintiff's conduct. This action on their part is to introduce a conflict between circuit courts of appeals in a class of cases that are constantly being brought before the court. We respectfully ask attention to the gravity and importance of the principal question here involved—the right on the part of the appellate court to re-examine after verdict, a question of alleged contributory negligence of a plaintiff, when that question has been passed upon by a jury; and to conduct that re-examination, too, upon a motion by defendant for judgment notwithstanding verdict.

Our petition for a writ of *certiorari*, we respectfully submit, should be granted, to the end that the judgment of the Circuit Court of Appeals may be reversed, with costs.

PAUL J. SHERWOOD,
For Petitioners.

FRANK W. HACKETT,
Of Counsel.

Office Supreme Court, U. S.
FILED
OCT 5 1909
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1909.

No. [redacted] 132

JOHN FLANNELLY AND
MARY ELLEN FLANNELLY,
Petitioners,

vs.

THE DELAWARE AND HUDSON
COMPANY,
Respondent.

Brief of Counsel for Respondent

UPON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

JAMES H. TORREY,
Attorney for Respondent.

IN THE

Supreme Court of the United States

October Term, 1909.

No. .....

JOHN FLANNELLY & MARY ELLEN FLANNELLY,
Petitioners,

vs.

THE DELAWARE AND HUDSON COMPANY,
Respondent.

UPON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Respondent's Brief.

The trial in this case resulted in a verdict in favor of the plaintiffs. An appeal was taken by the defendant to the Circuit Court of Appeals for the Third Circuit, the first four assignments of error being predicated upon the refusal of the Court to give binding instructions to the jury as requested in the points submitted at the conclusion of the trial, as follows:

"FIRST: Under all the evidence, the verdict must be for the defendant."

"*SECOND:* There is no evidence in the case which would warrant a verdict in favor of the plaintiff."

"*THIRD:* The evidence establishes no proof of negligence on the part of the defendant which would warrant a recovery in this case."

"*FOURTH:* The evidence conclusively establishes negligence upon the part of the plaintiff, Mary Flannelly, which contributed to her injuries, if she received any, and therefore the verdict must be for the defendant."

The Fifth and Sixth Assignments of Error were predicated upon the refusal of the trial Court to enter judgment for the defendant *non obstante veredicto* upon the rule granted to show cause why such judgment should not be entered.

As is indicated in the brief of the petitioner in this Court, the practice has long prevailed in Pennsylvania of reserving the question of the right of the plaintiff upon the whole record to recover, and in case a verdict is rendered in favor of the plaintiff, the review of the question reserved upon a rule for judgment *non obstante veredicto*. So long as this custom was simply one adopted by the Pennsylvania courts for their convenience, it may be conceded that it was not such a mode of procedure as the courts of the United States sitting within the State were required to adopt and conform to. In 1905, however, the Legislature of Pennsylvania passed a statute regulating the practice in this regard, the title only of which is cited in the petitioner's brief in this case at page 9. The statute reads as follows:

"AN ACT

Authorizing the courts of this Commonwealth to certify the evidence and enter judgment upon the whole

record, whenever a request for binding instructions has been reserved or declined by the trial judge; and authorizing appeals from the judgment so entered, and the entry of the proper judgment in the Supreme or Superior Court."

Section 1. Be it enacted, &c., That whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the Court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court.

Approved—The 22nd day of April, A. D. 1905."

It is here contended and has been that the practice so prescribed by statute was binding upon the United States Circuit and District Courts sitting in the State of Pennsylvania, under the provisions of the Act of Congress of June 1, 1872, *R. S., Section 914, U. S. Comp. Stat. 1901, p. 684*, as follows:

"The practice, pleadings, forms and modes of procedure in civil cases other than in courts of equity and admiralty in the Circuit and District Courts shall con-

form as near as may be to the practice, pleadings, forms and modes of procedure existing at the time in like cases in the courts of record in the State within which said Circuit or District Courts are held, any rule of the Court to the contrary notwithstanding."

The trial court recognized the obligation to follow the procedure laid down in this statute and granted the rule for judgment *non obstante veredicto*, which was fully argued with no objection upon the part of the counsel for the petitioner here. The form of the rule as entered was as follows:

"Now, to wit, March 27th, 1908, the defendant, by its attorneys, move the Court to have all the evidence taken upon the trial duly certified and filed and for judgment *non obstante veredicto* upon the whole record; particularly upon the refusal of the request of the defendant contained in its first four points for charge for binding instructions to the jury, in favor of the defendant.

(Signed) WELLES & TORREY,
Attorneys for Defendant."

And endorsed:

"And now, March 27th, 1908, upon motion in open court, rule for judgment *non obstante veredicto* is granted as prayed for, returnable *sec. reg.*

(Signed) R. W. ARCHBALD,
District Judge."

(Record, page 36.)

An appeal having been taken, as above stated, and the errors assigned as herein detailed, elaborate briefs were filed by the petitioner here and oral argument had, no objection being made either in the briefs or the argument to the manner in which the record had been brought into the Court of Appeals, or to the consideration of the case upon the assignments of error as filed.

The judgment having been reversed, the petitioner here filed in the Circuit Court of Appeals a motion for a reargument, with a full brief in which no suggestion was made that the record was defective in its form, or that the issues were such that the Court could not properly consider them. The grounds upon which the reargument was sought were that the Court had erred in its findings as to the effect of the testimony.

We contend that the form in which the issue was framed in the court below and upon appeal having been argued through all its stages without the objection now made, the petitioner should not be heard to introduce the new issue, even if it were meritorious.

THE PRACTICE PERSUED IN THIS CASE WAS PROPER.

The case of Delmas vs. Kemble, 215 Pa. St. 410, cited in the petitioners' brief, is the first case which went to the Supreme Court of Pennsylvania under the statute of 1905, in which the effect of the statute was fully considered. The excerpts from the opinion quoted by the petitioners are less full than could have been desired. We add the following occurring upon pages 411 and 412:

> "The Court has long had authority to direct a verdict for defendant when it was of opinion that the plaintiff, even if all his evidence be believed, has failed to make out his case. But this had to be done offhand at the trial and a mistake of the judge either way resulted in delay and expense.* * *
>
> No doubt when time was not urgent and trials were conducted leisurely, with full argument on every point as it arose, the system worked fairly well. But with

the growing complexity of issues, the constantly increasing pressure upon the trial lists, the taking of testimony in shorthand and the consequent hurry of trials, the inconvenience became burdensome. In practical reforms for facilitating business without impairing settled legal principles Pennsylvania has always been in the front. The authority to reserve questions of law for the consideration of the court *en banc* was first conferred by the Act of March 1, 1825, P. L. 41, upon the judges of the District Court of Philadelphia * * * and extended to the courts of the Commonwealth generally by the Act of April 22, 1863, P. L. 554, together with the power also first conferred on the District Court of Philadelphia to enter a compulsory non suit if the plaintiff's evidence is not sufficient to maintain his action.

The Act of 1905 is another step in the same direction. It broadens the power of the judge in this respect, that whereas heretofore the verdict was required to be for the plaintiff and the reservation to be of leave to enter judgment for the defendant *non obstante*, now what is reserved is a request for binding direction to the jury and may be for either plaintiff or defendant, but though thus enlarged as to include both parties, the power of the judge is the same as it was before. He is 'to enter such judgment as should have been entered upon the evidence,' or in other words to treat the motion for judgment as if it was a motion for binding directions at the trial and to enter judgment as if such direction had been given and a verdict rendered in accordance. What the judge may do is still the same in substance but the time when he may do it is enlarged so as to allow deliberate review and consideration of the facts and the law upon the whole evidence. If upon such consideration it shall appear that a binding direction for either party

> would have been proper at the close of the trial the Court may enter judgment later with the same effect."

In the foregoing citation there is reference to the practice of Pennsylvania courts as established by State statute of entering non-suit as analagous to the powers conferred by the Act of 1905.

In the cases cited in the petitioners' brief of Central Transportation Co. vs. Pullman, 139 U. S. 40, and Coughran vs. Bigelow, 164 U. S. 308, it is held that under the United States statute of 1872 the United States Courts sitting in Pennsylvania are bound by the practice as to non-suits regulated by the State statute. By analogy the Court should hold that United States Courts sitting in Pennsylvania are equally required to follow the practice with reference to judgments *non obstante veredicto* prescribed by the Act of 1905.

There was no invasion in this case of the province of the jury. The Circuit Court of Appeals found that the case was one which would have required the judge to direct a verdict for the defendant on the ground of contributory negligence. That being the case the Court should have entered judgment for the defendant *non obstante veredicto* and failing to do so should be reversed.

EVEN IF THE PRACTICE OF ENTERING JUDGMENT *NON OBSTANTE VEREDICTO* WERE ERRONEOUS, IT WOULD IN THIS CASE BE HARMLESS ERROR.

The opinion of the Circuit Court of Appeals concludes as follows:

> "Her" (Mrs. Flannelly's) "uncontradicted statements disclose contributory negligence on her part. There was nothing in the case to warrant a verdict based upon an absence of all contributory negligence. As there was nothing to warrant such a verdict the motion for judgment *non obstante veredicto* should have been granted. The judgment below must be reversed, with costs, and it is so ordered."

Recurring once more to the assignments of error in the Circuit Court of Appeals, the Fourth Assignment complains of the Court's refusal to charge the jury as follows:

> *"FOURTH:* The evidence conclusively establishes negligence upon the part of the plaintiff, Mary Flannelly, which contributed to her injuries, if she received any, and therefore the verdict must be for the defendant."

The Circuit Court of Appeals in its opinion, as above cited, says:

> "Her uncontradicted statements disclose contributory negligence on her part."

Consequently, if it had been argued by the petitioner here that the Court below had no right to grant a rule for judgment *non obstante veredicto* and that the Circuit Court of Appeals had no right to review its disposition of such a rule, the result would evidently have been that the Fourth Assignment of Error would have been sustained and the same judgment of reversal entered.

All of the assignments of error in substance complain that the case made out by the plaintiffs did not justify its submission to a jury, but that binding instructions for the defendant should have been given. The Court of Appeals

sustained this position, and it is a matter of no moment in what form of words it expresses its conclusion. After a careful and conscientious review of the theory and evidence of the plaintiff, disregarding altogether the evidence upon the part of the defendant, the Court of Appeals reached the conclusion that under the plaintiff's own showing she was guilty of such contributory negligence as barred a recovery. Having reached this conclusion, there was nothing to do but reverse the judgment and enter judgment for the defendant.

THE CONCLUSIONS AND JUDGMENT OF REVERSAL OF THE CIRCUIT COURT OF APPEALS WERE FULLY JUSTIFIED BY THE RECORD AND THE DECISIONS OF THIS COURT.

As has been already pointed out, in reaching its conclusion that the plaintiff, Mary Flannelly, was guilty of contributory negligence, the Circuit Court of Appeals considered only the testimony of the plaintiff and her witnesses and disregarded wholly the mass of testimony offered by the defendant. The effect of the defendant's testimony was that the defendant was in no way negligent in the operation of its trains, but that all signals were duly given; that the plaintiff was in no respect injured, but safely jumped from her wagon before its wheel was struck by the train. All this and much other testimony of the defendant was wholly disregarded, as it must be, the verdict of the jury settling the facts in favor of the plaintiff so far as they were disputed.

The Circuit Court of Appeals, however, in reaching its conclusion, applied the doctrine of this Court as stated in *Phoenix Mutual L. Ins. Co. vs. Doster, 106 U. S. 30-32*, as follows:

> "It is well settled that the Court may withdraw a case from a jury altogether and direct a verdict for the plaintiff or the defendant as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the Court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it."

This doctrine is frequently recognized and enforced in other decisions of this court. (See *Griggs v. Houston, 144 U. S. 553; Randall v. B. & O. R. R. Co., 109 U. S. 478-482; Anderson County Commissioners v. Beal, 113 U. S. 227-241; Schofield v. Chicago, M. & St. P. R. R. Co., 114 U. S. 615-618; Elliott v. Chicago, M. & St. P. R. R. Co., 150 U. S. 245; Patton v. Texas & Pacific R. R. Co., 179 U. S. 658.)*

THERE WAS NO EVIDENCE NOR REASONABLE INFERENCES FROM THE EVIDENCE WHICH RAISED A QUESTION OF FACT FOR THE JURY AS TO CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF BELOW.

The petitioners' motion for a reargument in the Circuit Court of Appeals was substantially based on the contention now made here that there was evidence sufficient to go to the jury to the effect that the train which obstructed Mrs. Flannelly's view was not a moving train but was standing still upon the track nearest to her.

It is not conceded that she would be relieved of the charge of contributory negligence even if that were so.

That it was substantially conceded that it was not a

standing but a moving train is demonstrated by the following excerpts from the brief of the counsel for the petitioners filed upon appeal in the Circuit Court of Appeals.

> "While she stood there looking and listening, a train composed of high box cars made its appearance around the corner coming from the direction of Scranton going towards Pittston, which would be south, *and slowly pulled over* on and upon the switch track next to her standing horse and on down the crossing in front of her on the track she must first cross. *Mrs. Flannelly waited until the hind end of the freight train had passed her a sufficient distance to allow another view of the track to the South*" (page 2).

> "So that when this woman stood with her rig facing the track with the desire to cross there were two trains with two engines at her back and at least two and possibly three different heavily loaded freight and coal trains *passing in front of her horse's head*" (page 3).

> "While they stood waiting at the usual stopping place a train of defendant composed of *box cars passed the crossing* on the track nearest her going towards Pittston" (page 5).

> "The train on the nearest track to Mrs. Flannelly *was moving slowly south*" (page 6).

> "*After this train of box cars had pulled past the crossing* to the south it cut off her view way down the road, as testified by her in response to a question on cross-examination" (page 10).

> "Furthermore, the train of box cars on the nearest track to Mrs. Flannelly, the approaching flyer which did the damage, and the other trains about her *were constantly on the move*" * * *

> "It is not always contributory negligence *per se* for a person to attempt to cross a railroad track without waiting for a train which *has just passed* to have gone so far as to leave an unobstructed view of another train approaching on a parallel track in a contrary direction" (page 13).

In reviewing the case of the West Jersey Railroad vs. Ryan, counsel says:

> "That case is very different from the one under consideration where the traveler, a woman, drives up a hill to the usual stopping place, stops there, has a lengthy view of the tracks to the south, and there is no train upon them, waits there until two trains come from the north, proceeding to the south, pass the crossing, *still waits until the hind end of the train on the tracks nearest her is some distance from the crossing,*" (etc. page 27).

> "She had stopped and looked and listened at the usual stopping place and is positive that the train which damaged her is not yet within the possible range of vision. Other trains then appear and she waits *till they pass the crossing*" (page 31).

We have carefully re-read this original brief and can find nowhere between its covers any suggestion that the train upon the first track was standing, to offset the above numerous assertions that it was moving, passing, "receding."

Neither is the contention that the train was standing supported by the evidence of the witnesses whose testimony is quoted in the brief for petitioners. On cross-examination Witness William White (record page 112) says:

> "They could have been moving or not. I could not say."

Witness Alice Ahearns says:

"Q. You could not be sure that it was not moving?
"A. I don't think it was moving."

The plaintiff herself clearly testified that it was a moving train which did not stop and she is substantially corroborated by all the witnesses on both sides and her testimony so corroborated furnished the basis for the theory upon which the case was at all times argued by the petitioners' counsel until the opinion of the Circuit Court of Appeals seemed to make necessary the adoption of some other theory of the facts.

We submit that the case has been thoroughly and carefully considered; that it was decided strictly in accordance with the practice of the courts as prescribed by the Pennsylvania statutes, upon the proper principles of law as determined by a long line of decisions of this Court; and that no question is presented which requires or invites a review by this Court.

Respectfully submitted,

JAMES H. TORREY,

Attorney for Respondent.

Office Supreme Court, U. S.
FILED.
DEC 9 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1909.

JOHN FLANELLY and
MARY ELLEN FLANNELLY,
Plaintiffs-in-error,
vs.
THE DELAWARE AND HUDSON COMPANY,
Defendant-in-error.

No. [redacted] 13

MOTION TO ADVANCE.

Now come the plaintiffs-in-error and respectfully move the court to advance this cause for an early hearing.

FRANK W. HACKETT,
Attorney for Plaintiffs-in-error.

NOTICE TO COUNSEL FOR DEFENDANT.

TO JAMES H. TORREY, ESQ.

Sir: Be pleased to take notice that on Monday, December 13th, or as soon thereafter as we may be heard, I shall move the court to advance this cause for hearing.

FRANK W. HACKETT,
Attorney for Plaintiffs-in-error.

The defendant-in-error admits service of this notice and makes no objection to the motion.

THE DELAWARE AND HUDSON COMPANY,
By JAS. H. TORREY,
Counsel for Defendant-in-error.

Scranton, Pa., Dec. 7th, 1909.

BRIEF.

1. The chief point to be determined is the right of the Circuit Court of Appeals of the Third Circuit to reëxamine facts tried by a jury, and to go over the entire testimony upon writ of error, where no bill of exceptions had been taken below. The trial court refused to grant a motion by the defendant for judgment, notwithstanding verdict against the company. The Circuit Court of Appeals have reëxamined the facts, and reversed the judgment. This we say that court had no right to do. To reëxamine the facts that had been found by the jury was to violate the seventh amendment of the Constitution. The Circuit Court of Appeals had no jurisdiction, we contend, to reverse the judgment below.

The railroad system of Pennsylvania covers so large a territory, and is engaged in such an enormous amount of traffic, that damage suits in the Federal courts against railroad companies are likely to be numerous. The point involved in this case is one that may frequently be taken in those suits. An early determination by this court is of enough public importance, therefore, to justify our petition for a speedy bringing of the question to trial.

2. In addition to the public interest attached to a decision of this point of law, we may be permitted to mention the circumstance that our suit is for personal injuries inflicted upon individuals of very humble means. It is of a class of actions where the evils of delay are severely felt. Such actions are not likely to reach the highest court unless they possess at least some merit.

We feel encouraged to believe that this Honorable Court can readily grant our request, and not thereby infringe in the slightest degree upon the rights of parties to other suits upon the calendar.

Respectfully submitted,

FRANK W. HACKETT,

For Plaintiffs-in-error.

Supreme Court of the United States.

JOHN FLANNELLY AND
MARY ELLEN FLANNELLY,
Petitioners, etc.
vs.
THE DELAWARE AND HUDSON COMPANY,
Defendants.
} No. 132.

Upon Certiorari to Circuit Court of Appeals, Third Circuit.

BRIEF FOR PETITIONER.

STATEMENT OF FACTS.

Action in the Circuit Court for the Middle District of Pennsylvania against a railroad company for injuries resulting from negligently running a train, at a high rate of speed, across a public highway, without warning. Plaintiffs were husband and wife. Verdict for plaintiffs. Defendant moved for judgment, *non obstante veredicto*, upon the whole record (Rec., 36). Motion denied, and defendant excepted (Rec., 42). Defendant had likewise moved for a new trial, which motion the trial judge overruled; and defendant did not take an exception (Rec., 40 *et seq.*).

Defendant took up the entire record (including all the evidence) to the Circuit Court of Appeals. That court reversed the judgment of the trial court (Rec., 451).

Our brief, hitherto filed upon petition for *certiorari*, contains a full statement of facts. We, therefore, respectfully

refer to that brief (pp. 2–4) for further statement of facts instead of reprinting the same here.

Assignment of Errors.

The Circuit Court of Appeals erred—

1. In taking jurisdiction of the cause upon writ of error allowed for exception to order of trial court, denying motion for judgment for defendant, notwithstanding verdict rendered for plaintiffs.

2. In reversing judgment of trial court after that court had denied a motion for judgment for defendant *non obstante veredicto.*

Points of Law.

We repeat here the points of law upon which we relied in the earlier brief, as follows:

1. The Circuit Court of Appeals had no jurisdiction to proceed upon the writ of error, there being no question of law to review.

2. The Circuit Court of Appeals reëxamined a fact tried by a jury, namely, that of the alleged contributory negligence of plaintiff Mary Flannelly in driving over the railroad track, the jury having found that Mary Flannelly, plaintiff, was not negligent. This reëxamination the court conducted otherwise than according to the rules of the common law.

3. The Circuit Court of Appeals did not treat the question of contributory negligence as a question of fact for the jury.

The language of the seventh amendment of the Constitution is familiar to the Court:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law."

Since the decision in *Parsons* vs. *Bedford*, 3 Peters, 433, it has been settled that an Appellate Court of the United States can proceed no farther than to grant a new trial; and this is done upon appeal from a motion for a new trial, upon bill of exceptions. The law on this point was recently again stated by Mr. Justice GRAY, in an opinion dealing with the subject of trial by jury, that recites the history of the origin of the seventh amendment. *Capital Traction Co.* vs. *Hof* (1898), 174 U. S., 1.

> "It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that * * * when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be reëxamined in any court of the United States otherwise than according to the rules of the common law of England; that by the rules of that law no other mode of reëxamination is allowed than upon a new trial, either granted by the Court in which the first trial was had, or to which the record was returnable, or ordered by an appellate court for error in law (page 13)."

In Pennsylvania an innovation in practice was ventured upon, a few years ago, and in 1905 the following statute went into operation, as appears from a recital in 215 Pa. St., 411:

> "Whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may * * * move the court to have all the evidence taken upon the trial duly certified and filed, so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court * * * to enter such judgment as should have been entered upon that evidence."

It was conceived that this wide departure from the common-law rule would expedite the trial of causes. Whether

it does so or not, or whether it works out substantial justice or not, are questions which do not concern us. It is enough to say that the new practice has changed the common-law rule. "The Act of 1905," says Judge GRAY, of the Circuit Court of Appeals, "enlarges the scope of the common-law motion for judgment for plaintiff, notwithstanding the verdict for the defendant, by permitting it to be made by either plaintiff or defendant, when the verdict is against either." *Fries-Breslin Co.* vs. *Bergen*, 176 Fed. Rep., 81.

The cardinal point here is that the Appellate Court, instead of granting a new trial, has ordered a judgment for the defendant, notwithstanding that a jury had rendered a verdict for the plaintiffs. In so doing the Court of necessity reëxamined a fact tried by the jury, and proceeded in a manner not known to the common law at the date of the adoption of the seventh amendment to the Constitution. This is precisely what the seventh amendment forbids.

Our declaration alleges that the plaintiff, Mary F., was "with due care" attempting to drive across, etc. (Rec., 7). This fact was determined by the jury, after a full explanation by the presiding judge of what was plaintiff Mary F.'s duty in respect to carefully looking and hearing. "If she went forward in that way before she had made a proper observation, or taken a position to see what was coming, she took the risk, and the fault is her own" (Rec., 29). "You must decide * * * that Mrs. Flannelly was free from contributory negligence, or negligence on her part, or you cannot find in her favor" (Rec., 30).

The presiding judge, in denying the motion for judgment for defendant *non obstante veredicto* says of the jury:

"The rule with regard to contributory negligence having been fully explained to them it must be assumed that they properly applied it and found that the plaintiff did not drive on to the tracks until she had waited a suitable time so as to have a sufficient view and be able to make such an observation as was required of her before doing so" (Rec., 38).

Mr. Justice BRADFORD, speaking for the Circuit Court of Appeals, makes it evident that the Court entered upon an examination of this question of fact anew, in order to find out whether the Court of Appeals should or not agree with the conclusion reached by the jury upon the fact of due care having been exercised by Mrs. Flannelly. The jury found that Mrs. Flannelly *did* observe due care; the Circuit Court of Appeals—that she did not. "She failed to observe due care" (Rec., 461).

This method of a reëxamination of the facts by an appellate court, after a verdict of the jury below, may be agreeable to the State practice in Pennsylvania, and it may have become so much a matter of custom there as to justify the profession in believing it to be fruitful in good results; but it cannot be sustained in courts of the United States, in face of the plain terms of the seventh amendment to the Constitution.

We submit that the order of the Circuit Court of Appeals should be reversed, and direction given to that Court to enter the proper order affirming, with costs, the judgment of the trial court in favor of the plaintiffs.

PAUL J. SHERWOOD,
For Petitioner.

FRANK W. HACKETT,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 132

Office Supreme Court, U. S.
FILED
DEC 18 1911
JAMES H. McKENNEY,
CLERK.

John Flannelly and Mary Ellen Flannelly, Petitioners, etc.

vs.

The Delaware and Hudson Company.

No. 132

Upon Certiorari to Circuit Court of Appeals, Third Circuit

BRIEF FOR RESPONDENT

W. S. OPDYKE,
LEWIS E. CARR,
JAMES H. TORREY,
Of Counsel.

WELLES & TORREY,
Attorneys for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 132.

JOHN FLANNELLY AND MARY ELLEN FLANNELLY,
Petitioners,
vs.
DELAWARE & HUDSON COMPANY.

Certiorari to the Circuit Court of Appeals for the Third Circuit.

BRIEF FOR THE DELAWARE & HUDSON COMPANY, RESPONDENT.

This was an action of trespass brought in the Circuit Court of the United States for the Middle District of Pennsylvania by John Flannelly and Mary Ellen Flannelly, his wife, to recover for personal injuries to the wife alleged to have been sustained by her in a collision between the vehicle in which she was riding, herself being the driver, and a train of the defendant at a grade crossing

of the highway and the railroad, due, as alleged by the plantiff, to the negligent operation of the railroad by the defendant. Under the Statute of Pennsylvania followed in this case damages of the husband and wife for physical injury to the wife must be sued for in a joint action. The case was tried before a jury which rendered a verdict of five hundred ($500) dollars for the husband and two thousand ($2,000) dollars for the wife.

Following the practice prescribed by an Act of the Legislature of Pennsylvania approved the 22nd day of April, 1905, a complete copy of which is appended as Exhibit A to this brief, the defendant at the close of the trial submitted the following requests for instructions to the jury:

> "First--Under all the evidence, the verdict must be for the defendant."
>
> "Second—There is no evidence in the case which would warrant a verdict in favor of the plaintiff."
>
> "Third—The evidence establishes no proof of negligence on the part of the defendant which would warrant a recovery in this case."
>
> "Fourth—The evidence conclusively establishes negligence upon the part of the plaintiff, Mary Flannelly, which contributed to her injuries, if she received any, and therefore the verdict must be for the defendant."

which were refused by the Court and an exception taken and bill sealed before the rendition of the verdict (R. 35).

As required by the Act, after the rendition of the verdict the defendant moved to have all the evidence taken upon the trial duly certified and filed and for judgment *non obstante veredicto* upon the whole record, particularly upon the refusal of the above points. Order and rule for judgment were accordingly granted (R. 36). The evidence was duly certified and filed and so became part of the record (R. 431). This rule for judgment *non obstante veredicto* was subsequently discharged and judgment was entered upon the verdict (R. 440).

From this judgment an appeal was taken to the Circuit Court of Appeals for the Third Circuit wherein the same was fully heard and in due course the opinion of the Court was filed by Bradford, District Judge, in which it was concluded that there was nothing in the case to warrant a verdict for the plaintiffs; that the motion for judgment *non obstante veredicto* should have been granted, and thereupon the judgment was reversed with costs (R. 441-445).

An application for re-argument of the case in the Circuit Court of Appeals was presented and refused (R. 476).

Subsequently plaintiffs applied to this court for a writ of certiorari which was granted and a writ issued October 19th, 1909 (R. 476).

ARGUMENT.

The errors assigned in this case raise but two questions:

1. Had the Circuit Court of Appeals jurisdiction to entertain the writ of error which was allowed and heard by it?

2. Did the Circuit Court of Appeals err in reversing the judgment of the trial court and entering judgment for the defendant *non obstante veredicto.*

We contend upon these questions:

First—The Pennsylvania Act of 1905 (Appendix A to this brief) is a valid Act applicable by the Conformity Act of Congress to courts of the United States within the State of Pennsylvania.

Second—Independently of the Act of Assembly the Circuit Court of Appeals had power to reverse the judgment upon the defendant's fourth specification of error in the cause as it came before that court.

Third—The Circuit Court of Appeals having found vital error in the submission of the case to the jury could at least have reversed with venire facias de novo and should still be given the opportunity to enter such judgment if this Court should find the judgment actually entered erroneous.

As preliminary to the discussion of these points, we remark that the jurisdictional question is raised for the first time in this court.

The application of the Seventh Amendment to the Constitution to this case was never invoked until the petition was filed in this case. After the rendition of the verdict, rule for judgment *non obstante veredicto* under the Statute was granted (R. 36).

It appears from the opinion of the Court discharging this rule that it was argued without question of the authority of the Court to make it absolute. (See opinion of the Court, R. 37.)

A writ of error was allowed to the Circuit Court of Appeals (R. 432) upon assignments of error raising the question of the action of the Court discharging the rule for judgment *non obstante veredicto* (R. 41-42).

The case was argued in the Circuit Court of Appeals without question as to the jurisdiction of that court to entertain the appeal as appears from the points covered by the opinion of that Court (R. 441).

The petitioner filed a motion and reasons for re-argument in the Circuit Court of Appeals, which appear in extenso (R. 446-457). Nowhere in that motion or the reasons therein assigned for a re-argument, is there the remotest suggestion that the

court was without jurisdiction to hear the cause or enter the judgment which had been previously ordered.

It therefore appears clearly that the Constitutional and jurisdictional question now raised was never raised at any stage of the proceedings until the petition was filed in this court. The petitioners submitted to the jurisdiction and orders of the Court upon the merits of the case through all its stages until nothing was left to them but the recourse to the jurisdictional question which they then raised for the first time.

It may be that the mere fact that the question was not earlier raised does not preclude its consideration by this court, but it clearly requires that the argument in support of the point as now raised should be closely scanned and suggests that it is an afterthought when all other resources were exhausted.

We argue:

FIRST—THE PENNSYLVANIA ACT OF 1905 (APPENDIX A TO THIS BRIEF) IS A VALID ACT APPLICABLE BY THE CONFORMITY ACT OF CONGRESS TO COURTS OF THE UNITED STATES WITHIN THE STATE OF PENNSYLVANIA.

The first case in which the provisions of the Statute were considered by the Supreme Court is *Del-*

mas vs. Kemble, 215 Pa. 410, in which the effect of the Statute is fully considered and its conformity to the previous practice of the courts and its tendency to limit and expedite litigation are clearly shown.

The appellate courts of Pennsylvania have ever since availed themselves freely of the provisions of the Act to end litigation. In the latest volume of State Reports issued, 230 Pa., appear the following cases in which under the provisions of this Act judgment in favor of the plaintiff was reversed and judgment entered *non obstante veredicto* for defendant:

Joyce vs. Baltimore & Ohio R. R. Co., 230 Pa. 1.

Rocap vs. Bell Telephone Company, 230 Pa. 597.

The applicability of the Statute to the United States courts in Pennsylvania was first considered in the case of *Fries-Breslin Co. vs. Bergen, 168 Fed. Rep. 360,* where after verdict for plaintiff upon a rule for judgment *non obstante veredicto* the Court, Holland Judge, after full consideration of the Act of 1905 and its application to the federal courts, the verdict was set aside and judgment was entered *non obstante veredicto.*

The question came clearly before the Circuit Court of Appeals for the Third Circuit in the case of *Smith vs. Jones, 181 Fed. Rep. 819, 104 C. C. A. 329.* The opinion of the Court in this case by Buf-

fington, J., is so full and convincing that it deserves to be fully quoted.

> "It is contended, however, that the Court below was without power to enter a judgment in favor of the defendants *non obstante veredicto* in pursuance of the Pennsylvania practice Act of April 22, 1905 (P. L. 286). In Fries-Breslin Co. vs. Bergen, 176 Fed. 76, this Court held that:
>
> 'Under the conformity provisions of section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), the Circuit Court was required to recognize the practice authorized by the said Pennsylvania Act of 1905; there being nothing incongruous therein with the organization of the Federal Courts of their settled rules of procedure.'
>
> In view of the able argument made in the present case in support of an opposite view, we have re-examined the question but find no reason to differ from our former conclusion. The practice of entering judgments *non obstante veredicto* has long existed in Pennsylvania, and it enables the case to be concluded by a verdict, while the entry of judgment thereon is made dependent on the Court's opinion on a reserved question of law. This permits the judge to give to the decisive law question on which a case turns a more careful examination than he can do in stress of trial. Moreover, if an appellate

court on review of such judgment finds error, it can reverse and direct entry of judgment for the other party and avoid a retrial. Long experience in this practice has convinced the bar and bench of the State of its value in conducing to a more careful and deliberate consideration of the law by the trial judge to the avoidance of retrials. The practice in Pennsylvania is of statutory origin, as stated by Judge Acheson in Casey vs. Pennsylvania Asphalt Co. (C. C.), 109 Fed. 746, adopted in 114 Fed. 189, 52 C. C. A. 145, and the principles involved in its application are set out in Fisher vs. Sharadin, 186 Pa. 568, 40 Atl. 1091, and Boyle vs. Mahanoy City, 187 Pa. 1, 40 Atl. 1093. Under the Conformity Act this practice has long been followed in the Federal Courts in Pennsylvania and met with the approval of this court in Carstairs vs. American Bonding & Trust Co., 116 Fed. 449, 54 C. C. A. 85. Subsequently the Act of April 22, 1905 (P. L. 286) was passed, which provides:

"That whenever, upon trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the Court shall allow, move the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; where-

upon it shall be the duty of the Court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the Court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the Court below, and enter such judgment as shall be warranted by the evidence taken in that court."

And its provisions have been adopted and followed in the practice in the United States courts in this State and approved, as we have seen, by this court in Fries-Breslin Co. vs. Bergen, *supra*.

That this practice results in but one trial and a final judgment on review is sound ground for the Federal Courts of this State conforming to the State's statutory practice. That this practice saves retrials and permits a final judgment when the case is reviewed shows its practical administrative worth. *Interest reipublicae ut sit finis litium*. That the Statute is of the kind to which the Conformity Act applies we are clear. Townsend vs. Jemison, 48 U. S. 706, 12 L. Ed. 880; Sawin vs. Kenny, 93 U. S. 289, 23 L. Ed. 926; Bond vs. Dustin, 112 U. S. 607, 5 Sup. Ct. 296, 28 L. Ed. 835; Ft. Scott vs. Eads, 117 Fed. 51, 54 C. C. A. 437.

The judgment of the Court below is therefore reversed and the case will be remanded, with directions to enter judgment *non obstante veredicto* in favor of the defendants"

See also to the same effect *MacCord vs. Baltimore & Ohio R. R. Co., 187 Fed. Rep. 443.*

And *Delaware, Lackawanna & Western R. R. Co. vs. Troxell, 183 Fed. Rep. 373.*

In the cases of *Central Transportation Co. vs. Pullman, 139 U. S. 40*, and *Coughran vs. Bigelow, 164 U. S. 308*, it is held that under the United States Statute of 1872 the United States courts sitting in Pennnsylvania are bound by the practice as to non suits regulated by the State Statute. By analogy the Court should hold that United States Courts sitting in Pennsylvania are equally required to follow the practice with reference to judgments *non obstante veredicto* prescribed by the Act of 1905.

There was no invasion in this case of the province of the jury. The Circuit Court of Appeals found that the case was one which would have required the judge to direct a verdict for the defendant on the ground of contributory negligence. That being the case the Court should have entered judgment for the defendant *non obstante veredicto* and failing to do so should be reversed.

The applicability of the Seventh Amendment to the Constitution to this practice, turns upon the

construction to be given to the word "re-examined" in the clause

> "And no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

Does the action of the Court of Appeals in this case constitute a re-examination of the facts found by the jury?

We contend that it does not, but that it is essentially a re-examination of the question of law which was submitted to the Court in the defendant's requests for charge to the jury, namely, the question of law—whether there was any evidence in the case which would sustain a verdict in favor of the plaintiff.

The Act of 1905 is an outgrowth and extension of the practice long prevailing in the Courts of Pennsylvania, and not inconsistent with the common law, by which the Court in submitting a case to a jury reserves certain questions of law, and the verdict is rendered not as a general verdict but one special in its character and subject expressly or by implication to the questions of law reserved for the consideration of the Court.

Delmas vs. Kemble, 215 Pa. 410.

The Court does not, under this practice, review or re-examine the testimony to ascertain whether

the jury correctly found the issues of fact or awarded adequate or excessive damages, but it considers all of the evidence in the case, which is made by the Statute a part of the record, when properly certified, for the purpose of reviewing the question which the points presented by the defendant required it to pass upon at the conclusion of the trial, namely, whether there was sufficient evidence in support of plaintiff's claim to submit to the jury. This is purely a question of law and not of fact.

The case of the *Southern Pacific Company vs. Pool, 160 U. S. 438*, illustrates very clearly the position that we take in this case. It was a suit brought to recover for the death of one Pool alleged to have been caused by the negligence of an employe of the defendant. At the conclusion of the trial the defendant requested the Court to give peremptory instructions in its favor, which, being refused, exception was taken. The Court submitted to the jury two questions,—first, as to what employe of the defendant was guilty of negligence, and, second, whether deceased used reasonable care and precaution to avoid injury. The jury answered the first question, "Kilpatrick," the second question, "yes." An appeal was taken to the Supreme Court of the Territory of Utah, where the judgment was affirmed. The case was then brought into this court. The Court, White, J. (p. 440), says as follows:

> "Was the accident caused by the negligence of Pool?

To answer this question involves an analysis of the evidence (which the record fully sets out), not for the purpose of weighing the testimony or of ascertaining the preponderating balance thereof, but in order to arrive at the undoubted proof, from which the legal consequence, negligence, results. There can be no doubt where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. *There is also no doubt where the facts are undisputed or clearly preponderant that the question of negligence is one of law. Union P. R. Co. vs. McDonald, 152 U. S. 262* (38:434). The rule is thus announced in that case (p. 283 (443): "Upon the question of negligence . . . the Court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the Court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Delaware, Lackawanna & Western R. Co. vs. Converse, 139 U. S. 469, 472* (35:213, 215), and authorities there cited: *Elliott vs. Chicago, M. & St. P. R. Co., 150 U. S. 245* (37:1068); *Anderson County Comrs. vs. Beal, 113 U. S. 227, 241* (28:966,971)."

The judgment was reversed and the case remanded with directions to grant a new trial.

There can be no possible doubt that under the rulings of this court, the trial court in this case had power to, and under the defendant's requests for charge, if in accordance with the facts, was bound to, direct a verdict for the defendant at the close of the trial.

> "It is the settled law of this Court that when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is not sufficient to support a verdict if returned, which, if returned, must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendants."

Schofield vs. Railroad, 114 U. S. 615-616.

> "It is true that questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by the jury, yet when the undisputed evidence is so conclusive that the Court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict."

Elliott vs. Railroad, 150 U. S. 245-246. Brown, J.

As is fully explained by Chief Justice Mitchell in the case of *Delmas vs. Kemble, supra*, the purpose of the practice of receiving verdicts subject to reserved points, enlarged by the Act of 1905, was to

give the Court leisure to consider fully and intelligently the question of its right and duty to direct a verdict without the necessity of subjecting the parties and the Commonwealth to the trouble and expense of a second trial.

Conceding that it has been held by this Court that the words, "common law" in the Seventh Amendment, referred to the common law of England and not that of the several States, it is not clear that the common law of England does not permit the entry of judgment for defendant *non obstante veredicto*. The subject is ably discussed in an article by William A. Moury, 14 American Law Review, 494, with citations from a number of English decisions, among them the following:

Rand vs. Vaughan, 1 Bing. N. C. 767. 27 Eng. C. L. R. 568; Regina vs. Governor of Darlington School, 6 Q. B. 704. 57 Eng. C. L. R. 703; Benson vs. Duncan, 3 Exch. 652.

The result of the article is to reach the conclusion that the principles applied and recognized in the English courts under which judgments *non obstante veredicto* were sometimes rendered for the plaintiff, were equally applicable and would in proper cases have been applied to the cases of defendants similarly situated, and that the statements sometimes appearing in decided cases, in textbooks and encyclopaedias to the effect that under the English common law such judgments were entered only for plaintiffs and never for defendants, are unwarranted.

This, we contend, does not involve re-examination by the Court of the facts, but the review of the law which compels the plaintiff in a negligence case to prove damages suffered by reason of the negligence of the defendant under circumstances free from the charge of contributory negligence by the plaintiff.

SECOND: INDEPENDENTLY OF THE ACT OF ASSEMBLY OF 1905 THE CIRCUIT COURT OF APPEALS HAD POWER TO REVERSE THE JUDGMENT UPON THE DEFENDANT'S FOURTH SPECIFICATION OF ERROR IN THE CAUSE AS IT CAME BEFORE THAT COURT.

The opinion of the Circuit Court of Appeals concludes as follows (R. 445):

> "Her" (Mrs. Flannelly's) "uncontradicted statements disclose contributory negligence on her part. There was nothing in the case to warrant a verdict based upon an absence of all contributory negligence. As there was nothing to warrant such a verdict the motion for judgment *non obstante veredicto* should have been granted. The judgment below must be reversed, with costs, and it is so ordered."

The Fourth Assignment complains of the Court's refusal to charge the jury, as follows (R. 42):

"Fourth: The evidence conclusively establishes negligence upon the part of the plaintiff, Mary Flannelly, which contributed to her injuries, if she received any, and therefore the verdict must be for the defendant."

The Circuit Court of Appeals in its opinion, as above cited, says:

> "Her uncontradicted statements disclose contributory negligence on her part."

Consequently, if it had been argued by the petitioner here that the Court below had no right to grant a rule for judgment *non obstante veredicto* and that the Circuit Court of Appeals had no right to review its disposition of such a rule, the result would evidently have been that the Fourth Assignment of Error would have been sustained and the same judgment of reversal entered.

All of the assignments of error in substance complain that the case made out by the plaintiff's did not justify its submission to the jury, but that binding instructions for the defendant should have been given. The Court of Appeals sustained this position, and it is a matter of no moment in what form of words it expresses its conclusion. After a careful and conscientious review of the theory and evidence of the plaintiff, disregarding altogether the evidence upon the part of the defendant, the Court of Apepals reached the conclusion that under the plaintiff's own showing she was guilty of such contributory negligence as barred a recovery. Having reached this conclusion, there

was nothing to do but reverse the judgment and enter judgment for the defendant.

If it was the duty of the trial court, on the hearing of the rule for judgment *non obstante veredicto*, to find that there was no evidence in the case which would sustain a verdict in favor of the plaintiff and to set aside the verdict, the failure of the Court to take such action was error, which was reviewable upon proper presentation to the Appellate Court, and warranted a reversal.

THIRD—THE CIRCUIT COURT OF APPEALS HAVING FOUND VITAL ERROR IN THE SUBMISSION OF THE CASE TO THE JURY, COULD AT LEAST HAVE REVERSED WITH *VENIRE FACIAS DE NOVO*, AND SHOULD STILL BE GIVEN THE OPPORTUNITY TO ENTER SUCH JUDGMENT IF THIS COURT SHOULD FIND THAT THE JUDGMENT AFTERWARD ENTERED IN FAVOR OF THE DEFENDANT WAS ERRONEOUS.

Commenting upon the Seventh Amendment in its application to a certain state of facts, this Court said in *Parsons vs. Bedford*, 3 Peters 443-448:

> "The only modes known to the common law to re-examine such facts are the granting of a new trial by the Court where the issue was tried or to which the record is properly returnable,

> or the award of a *venire facias de novo* by the appellate court for some error of law which intervened in the proceedings."

To the same effect—*Capital Traction Co. vs. Hof, 174 U. S. 1-3,*
and other cases therein cited.

As argued under our second head, the Circuit Court of Appeals has found clearly that the trial court erred in refusing to affirm the defendant's Fourth request for charge to the jury. That error being found, it was the duty of the Circuit Court of Appeals to reverse the judgment. Should the position of the petitioners in this Court be sustained and should it be found that the Circuit Court of Appeals in so reversing had no power to enter judgment for the defendant, its power and duty would still remain to reverse the judgment with *venire facias de novo.*

This seems substantially conceded by the petitioners in their brief (page 4), as follows:

> "The cardinal point here is that the appellate court, instead of granting a new trial, has ordered judgment for the defendant, notwithstanding that a jury had rendered a verdict for the plaintiffs."

Upon their own presentation of the case, therefore, the utmost that they seek from this Court is a reversal of the judgment of the Circuit Court of

Appeals with directions that in reversing the judgment a *venire facias de novo* should be awarded.

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"EXHIBIT A."

"AN ACT authorizing the courts of this Commonwealth to certify the evidence and enter judgment upon the whole record, whenever a request for binding instructions has been reserved or declined by the trial judge; and authorizing appeals from the judgment so entered, and the entry of the proper judgment in the Supreme or Superior Court."

Section 1. Be it enacted, etc., That whenever, upon the trials of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed, so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the Court in that regard. From the judgment thus entered, either party may appeal to the Supreme or Superior Court as in

other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court.

"Approved the 22nd day of April, A. D. 1905."

In this case, *held* that the evidence on the question of contributory negligence of a woman crossing a dangerous railroad crossing was properly submitted to the jury, and that there was evidence from which the jury could well have found, as they did, that she was not negligent.

172 Fed. Rep. 328, reversed.

THE facts, which involve the question of negligence of a railroad company and degree of care required by one crossing a track, are stated in the opinion.

Mr. Frank W. Hackett and *Mr. Paul J. Sherwood* for petitioners:

No question of law was before the Circuit Court of Appeals; no bill of exceptions had been signed. The case went up on exceptions to the court's overruling defendant's motion for judgment for defendant notwithstanding the verdict for plaintiff and such a motion is unknown to the common law. Freeman on Judgment, § 7; *Smith* v. *Power*, 15 N. H. 546; *German Insurance Company* v. *Frederick*, 7 U. S. App. 122.

The Circuit Court of Appeals reëxamined the fact of alleged contributory negligence on the part of plaintiff. This procedure in a court of the United States is forbidden by the Seventh Amendment to the Constitution. *Parsons* v. *Bedford*, 3 Pet. 433; *Capital Traction Co.* v. *Hof*, 174 U. S. 1. Consult remarks of Matthews, J., in *Metropolitan R. R. Co.* v. *Moore*, 121 U. S. 537.

The presiding judge carefully instructed the jury to the effect that plaintiff could not recover if she had been negligent, the question of whether she was negligent was submitted to the jury, upon conflicting testimony; the jury found a verdict for plaintiffs and the presiding judge refused to set that verdict aside, on motion for a new trial. The Circuit Court of Appeals erred in treating the question of negligence as a question of law. That court had no jurisdiction to enter upon a review of the entire testi-

mony. Such action was not in accordance with the rules of the common law, as understood at the time when the Seventh Amendment to the Constitution was adopted.

Mr. James H. Torrey, with whom *Mr. W. S. Opdyke* and *Mr. Lewis E. Carr* were on the brief, for respondent:

The Pennsylvania act of 1905 is a valid act applicable by the Conformity Act of Congress to courts of the United States within the State of Pennsylvania. *Delmas* v. *Kemble*, 215 Pa. St. 410; *Joyce* v. *Balto. & Ohio R. R.*, 230 Pa. St. 1; *Rocap* v. *Bell Telephone Co.*, 230 Pa. St. 597; *Fries-Breslin Co.* v. *Bergen*, 168 Fed. Rep. 360; *Smith* v. *Jones*, 181 Fed Rep. 819; *S. C.*, 104 C. C. A. 329.

The practice of entering judgments *non obstante veredicto* has long existed in Pennsylvania. *Casey* v. *Pennsylvania Asphalt Co.* 109 Fed. Rep. 746, adopted in 114 Fed. Rep. 189, *S. C.*, 52 C. C. A. 145; *Fisher* v. *Sharadin*, 186 Pa. St. 568, *S. C.*, 40 Atl. Rep. 1091; *Boyle* v. *Mahanoy City*, 187 Pa. St. 1, *S. C.*, 40 Atl. Rep. 1093; *Carstairs* v. *American Bonding & Trust Co.*, 116 Fed. Rep. 449, *S. C.*, 54 C. C. A. 85.

The provisions of the act of 1905 have been adopted and followed in the practice in the United States courts in Pennsylvania. The statute is of the kind to which the Conformity Act applies. *Fries-Breslin Co.* v. *Bergen, supra; Townsend* v. *Jemison*, 7 How. 706; *Sawin* v. *Kenny*, 93 U. S. 289; *Bond* v. *Dustin*, 112 U. S. 607; *Ft. Scott* v. *Eads*, 117 Fed. Rep. 51; *S. C.*, 54 C. C. A. 437. See also, *MacCord* v. *Balto. & Ohio R. R. Co.*, 187 Fed. Rep. 443; *Delaware, L. & W. R. R. Co.* v. *Troxell*, 183 Fed. Rep. 373.

Under the act of Congress of 1872, the United States courts sitting in Pennsylvania are bound by the practice as to non-suits regulated by the state statute. *Central Transp. Co.* v. *Pullman*, 139 U. S. 40; *Coughran* v. *Bigelow*, 164 U. S. 308. By analogy the United States courts sitting in Pennsylvania are equally required to follow the

practice with reference to judgments *non obstante veredicto* prescribed by the act of 1905.

The action of the Court of Appeals in this case does not constitute a reëxamination of the facts found by the jury, prohibited by the Seventh Amendment to the Constitution of the United States. *Delmas* v. *Kemble*, 215 Pa. St. 410; *Southern Pacific Co.* v. *Pool*, 160 U. S. 438.

There can be no doubt that where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt where the facts are undisputed or clearly preponderant that the question of negligence is one of law. *Union P. R. Co.* v. *McDonald*, 152 U. S. 262; *Delaware, L. & W. R. Co.* v. *Converse*, 139 U. S. 469, 472, and authorities cited; *Elliott* v. *Chicago, M. & St. P. R. Co.*, 150 U. S. 245; *Anderson County Comrs.* v. *Beal*, 113 U. S. 227, 241.

The trial court in this case had power to, and under the defendant's requests for charge, if in accordance with the facts, was bound to, direct a verdict for the defendant at the close of the trial. *Schofield* v. *Railroad*, 114 U. S. 615, 616; *Elliott* v. *Railroad*, 150 U. S. 245, 246.

Even though the words "common law" in the Seventh Amendment referred to the common law of England and not that of the several States, it is not clear that the former does not permit the entry of judgment for defendant *non obstante veredicto*. *Rand* v. *Vaughan*, 1 Bing. N. C. 767, 27 Eng. C. L. R. 568; *Regina* v. *Governor of Darlington School*, 6 Q. B. 704, 57 Eng. C. L. R. 703; *Benson* v. *Duncan*, 3 Exch. 652.

Independently of the act of 1905, the Circuit Court of Appeals had power to reverse the judgment upon the defendant's fourth specification of error in the cause as it came before that court.

The Circuit Court of Appeals having found vital error in the submission of the case to the jury, it could at least

have reversed with *venire facias de novo*, and should still be given the opportunity to enter such judgment if this court should find that the judgment afterward entered in favor of the defendant was erroneous. *Parsons* v. *Bedford*, 3 Pet. 443–448; *Capital Traction Co.* v. *Hof*, 174 U. S. 1–3.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover damages for injuries and loss occasioned, as was alleged, by negligence of a railroad company resulting in the collision of one of its trains with a vehicle passing over a grade crossing in Pennsylvania. The negligence charged against the defendant was the failure to give due and timely warning of the approach of the train, and the defense interposed was the freedom of the defendant from the negligence charged, and the failure of one of the plaintiffs, who was driving the vehicle, to take reasonable precautions, before attempting to drive over the crossing, to ascertain whether she could do so in safety. In the Circuit Court there was a verdict and judgment for the plaintiffs, and the defendant took the case on a writ of error to the Circuit Court of Appeals. That court treated the record as presenting, in substance, two questions: First, whether there was any substantial evidence of actionable negligence on the part of the defendant, and, second, whether the evidence conclusively established the defense of contributory negligence. Upon examining the evidence purporting to be set out in the record, the Circuit Court of Appeals answered the first question favorably to the plaintiffs and the second favorably to the defendant, and accordingly reversed the judgment. 172 Fed. Rep. 328. The case was then brought here on a writ of certiorari granted on the petition of the plaintiffs.

Assuming, but without so deciding, that the state of the record was such as to justify the Circuit Court of Appeals in examining the evidence and determining whether it conclusively established the defense of contributory negligence, we come to consider whether that question was rightly decided.

As is often true in such cases, some matters were not disputed at the trial, while others were the subjects of conflicting testimony or of testimony from which different inferences reasonably could be drawn. The matters not disputed were these: The injury occurred in the daytime, at a grade crossing in a small country village. The defendant's tracks, which were three in number, ran in a northerly and southerly direction and crossed the highway at right angles. About 700 feet south of the crossing the tracks curved to the west, and when cars were occupying the east track south of the crossing a traveler on the highway east of the crossing could not see a train approaching from the south on either of the other tracks. Mrs. Flannelly, one of the plaintiffs and wife of the other, had occasion to drive along the highway from her home, a few miles east of the railroad, to a point on the other side of it. Seated in the vehicle with her were two small boys. As she neared the crossing a freight train was approaching on the east track from the north. She stopped about 40 feet from that track and waited for the train to pass, which took some time, as it was long and moving slowly. Before this train obscured the view she looked along the tracks to the south and observed that no train was in sight coming from that direction. After the rear of the freight train passed about 150 feet beyond the crossing she drove to the first track, or near it, and, on looking in both directions and seeing no train approaching, started to drive over the tracks. Her view at that time extended 300 feet or more to the south along the second track. As she was passing over that

track a passenger train approaching thereon from the south sounded a sharp danger signal, and soon struck a rear wheel of her vehicle, thereby wrecking the latter, inflicting bodily injuries on her, and killing one of the boys. The train was moving at a rate of from 50 to 60 miles an hour, or from 73 to 88 feet per second. There was also testimony, more or less disputed, from which the jury reasonably could have found that no whistle was sounded by the passenger train at the place where such a warning of its approach was usually and properly given; that the freight train came to a stop before Mrs. Flannelly drove on the tracks; that she listened attentively for signals given by approaching trains, but heard none, other than the danger signal which came too late to be of avail; that her horse became restive and nervous before she advanced to the crossing; that when the danger signal was sounded by the passenger train the horse halted, reared and delayed their progress between five and ten seconds; and that as that signal was sounded she saw the passenger train emerge from a volume of smoke or steam which was hanging over the tracks to the south.

The law requires of one going upon or over a railroad crossing the exercise of such care for his own protection as a reasonably prudent person ordinarily would take in the same or like circumstances, including the use of his faculties of sight and hearing. And, generally speaking, whether such care has been exercised is a question of fact for the jury, especially if the evidence be conflicting or such that different inferences reasonably may be drawn from it.

We think the evidence in this case, when tested by these standards, required that the defense of contributory negligence be submitted to the jury as a question of fact, as was done by the Circuit Court. The conclusion to the contrary in the Circuit Court of Appeals was rested upon

the theory that the freight train did not stop after clearing the crossing but continued in a southerly direction, thereby giving promise that the obstruction to the view along the tracks on that side of the crossing would quickly disappear. But a careful examination of the record satisfies us that there was evidence from which the jury could well have found that the train came to a full stop about 150 feet south of the crossing before Mrs. Flannelly started to cross over. If it did, she hardly could be declared negligent for failing to await its further movements, of which she knew nothing. Besides, if the action of her horse was as described, she ought not to be charged with negligence in not anticipating it.

Other questions were discussed at bar and in the briefs, but as, in the view which we take of the evidence examined by the Circuit Court of Appeals, the judgment of the Circuit Court should have been affirmed, the other questions need not be considered.

Judgment reversed.

FLANNELLY *v.* DELAWARE AND HUDSON CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 132. Argued December 19, 20, 1911.—Decided June 10, 1912.

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